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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CARLITO MONTOYA et al., Defendants and Appellants.	C082283 (Super. Ct. No. 13F00205)

Defendants were involved in a New Year's Eve shooting at a sports bar in Old Sacramento. Defendant Carlito Montoya shot four people after he and his codefendant, Charles Fowler-Scholz, initiated a confrontation with another bar patron over a spilled drink. A jury found Montoya guilty of two counts of first degree murder, one count of attempted premeditated murder, and one count of assault with a firearm. The jury also found he committed the offenses for the benefit of a criminal street gang and used a

firearm within the meaning of both Penal Code[1] sections 12022.53, subdivision (d) and 12022.5, subdivision (a)(1). Fowler-Scholz was tried in the same proceeding but opted for a court trial. The court found Fowler-Scholz guilt of two counts of second degree murder, one count of attempted murder, one count of assault with a firearm, and one count of assault with a deadly weapon. The court found the gun and gang allegations not true.

On appeal, the parties raise several sufficiency of the evidence claims. Montoya challenges the evidence presented at the preliminary hearing as insufficient to hold him to answer to the gang allegations and the resulting error of admitting large amounts of highly prejudicial gang evidence at trial denied him due process. In the event we conclude Montoya was properly tried on the gang allegations, he attacks the trial evidence supporting the jury's true findings along with the premeditation and deliberation finding required for the murder and attempted murder convictions. Fowler-Scholz contends the prosecution presented insufficient evidence to support the court's finding he aided and abetted in Montoya's nontarget offenses.

Defendants both argue the court erred by admitting prior acts evidence involving Fowler-Scholz's contact with guns. Related to this argument, Montoya contends the amount of gang evidence specific to Fowler-Scholz admitted in front of his jury was an abuse of discretion because it was cumulative and prejudicial to his case. Montoya also argues his counsel was ineffective for failing to object to the prosecutor's misconduct during closing argument, the court committed instructional error by failing to instruct the jury on voluntary manslaughter, and cumulative error resulted from these errors. He further requests we remand the case so the trial court can exercise its discretion to strike

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1 All further section references are to the Penal Code unless otherwise stated.

the firearm enhancements pursuant to recent amendments to the firearm statutes and Fowler-Scholz requests we fix his abstract of judgment.

In supplemental briefing, Montoya asks that we strike the court facilities fee (Gov. Code, § 70370), the court operations fee (§ 1465.8), and the booking fee (Gov. Code, § 29550.2) because the record does not establish his ability to pay these fees. He further asks that we stay execution of the general restitution fine imposed under section 1202.4 until the prosecution demonstrates his present ability to pay the fine. Fowler-Scholz joins this argument.[2]

We reject Montoya's claim the evidence was insufficient at the preliminary hearing to hold him to answer on the gang allegations, but agree the evidence supporting the jury's true findings on those same enhancements was lacking. Sufficient evidence does support the jury's finding Montoya acted with premeditation and deliberation and we are certain the jury would have found so even if defense counsel had objected to the prosecutor's argument urging the jury to use Montoya's gang affiliation as propensity evidence to show he premeditated and deliberated the murders and attempted murder. We conclude there was no instructional error and that evidence of Fowler-Scholz's gang activity did not prejudice Montoya. Accordingly, there was no cumulative error. We do agree, however, that remand is appropriate for the trial court to exercise its newly granted discretion to decide whether to strike the gun enhancements attached to Montoya's convictions.

As to Fowler-Scholz, we reject his argument that insufficient evidence supports his convictions premised upon the natural and probable consequence doctrine. While

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[2] At oral argument, Fowler-Scholz appeared to request supplemental briefing regarding Senate Bill No. 1437. We denied that request because the change in the law was not made retroactive to cases not yet final. Instead, Fowler-Scholz must file a petition in the trial court pursuant to section 1170.95. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 729.)

Fowler-Scholz argues three prior acts were erroneously admitted into evidence, we agree the court erred when admitting one of them. The error, however, was harmless. Finally, we direct the trial court to correct Fowler-Scholz's abstract of judgment to properly reflect his sentence for the assault with a firearm conviction.

Finally, as to defendants' supplemental briefing, we conclude they have not forfeited their challenges to the court facilities fee and the court operations fee, given recent authority that these statutorily mandated fees are unconstitutional. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168.) They have, however, forfeited their challenge to the general restitution fine and the booking fee because our Supreme Court has already determined an objection necessary to challenge the imposition of this fine and fee. (*People v. McCullough* (2013) 56 Cal.4th 589, 596-597 [challenge to evidence supporting the imposition of a booking fee forfeited by failure to object]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [court's failure to consider ability to pay a restitution fine is forfeited by failure to object].) Because there was no inquiry as to defendants' ability to pay, we decline to impute the court's implied finding that defendants had the ability to pay the restitution fine to the mandatory fees outlined in *Dueñas*. As a result, Montoya shall be provided with an opportunity to prove his inability to pay the court facilities and court operations fees upon remand. Fowler-Scholz's case shall also be remanded so that he may do the same.

FACTUAL BACKGROUND

Surveillance cameras stationed at multiple vantage points inside the sports bar recorded the events of defendants' night from when they arrived at the sports bar until the shooting. The video, which is in black and white, shows defendants arriving at the sports bar at 8:34 p.m. with Fowler-Scholz's wife, Amber Scholz,[3] and two black men. Fowler-

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[3] We refer to Amber by her first name to avoid confusion, no disrespect is intended.

Scholz wore a baggy white sweatshirt with a darker shirt hanging out from the bottom. Montoya wore a gray baggy sweatshirt and had the hood up upon entering the bar. The other male members of defendants' group also wore baggy clothing -- one a large dark jacket with a fur-lined hood and the other a baggy gray sweatshirt. Amber wore a neutral-colored sweater and carried a purse. The entire group wore jeans. Upon arriving, the group immediately ordered drinks from a temporary drink station set up at the back of the bar to accommodate the holiday crowd.

For the next hour, the group stood together near the temporary drink station and talked amongst themselves and with other patrons or employees, with Fowler-Scholz doing a majority of the talking. They frequented the temporary drink station, ordering beers and shots of liquor. Fowler-Scholz also bought drinks for people not with his group and can be seen giving high fives to multiple people and employees throughout the bar. During one such order at 9:19 p.m., Fowler-Scholz lifted his sweatshirt and shirt to show the bartender a tattoo covering his stomach. The tattoo is in large Old English script and reads "SACRA." Fowler-Scholz showed the tattoo for no longer than two seconds before lowering his sweatshirt. After showing the tattoo, Fowler-Scholz and other members of his group started dancing.

Over the course of the next 20 minutes, Fowler-Scholz lifted his sweatshirt in the same fashion as he did to the bartender and showed his tattoo twice to the people in his group and two other times to the man in his group wearing the gray sweatshirt who was not Montoya. At 9:42 p.m., Fowler-Scholz and Montoya went outside through the front door of the bar to smoke a cigarette and talked with Daniel Ferrier, the security guard stationed at the front door checking patrons' identifications. Amber also left the bar but out the side door where the bathrooms were located. A few minutes later, the man in the fur-lined jacket left out the side door, leaving only the man in the gray sweatshirt near the temporary drink station.

At 9:44 p.m., on her way back from the bathroom, Amber walked past Gabriel Cordova and he bumped into her spilling his drink on her sweater. After the spill, Cordova and Amber talked and Cordova apologized and offered to buy Amber a drink, but Amber walked away "pretty upset." She walked over to the temporary drink station where Fowler-Scholz and Montoya met up with her after returning from outside. Amber can be seen on the surveillance footage talking to Fowler-Scholz while gesturing to the areas of her sweater where Cordova spilled his drink. Fowler-Scholz grabbed a bottle of beer and then the group, without the man in the fur-lined jacket, walked in a single file line to the front of the bar.

When the group arrived at Cordova's location at the front of the bar, Amber pushed her way to the front of the group and pointed to Cordova saying "that [i]s the guy." Fowler-Scholz and Montoya approached Cordova; Amber and the man in the gray sweatshirt moved in behind them. Cordova's friend, Manuel Gutierrez, moved closer to Cordova and a scrum formed from the two groups. Fowler-Scholz accused Cordova of "disrespect[ing] my woman" and Cordova tried to explain what happened from his point of view. Fowler-Scholz seemed upset, angry, and looking for a fight. He told Cordova to step outside but Cordova refused.

Montoya stepped toward Cordova and said something to him, at which point Ferrier walked toward the group from his position by the front door. Before he could get there, Fowler-Scholz threw the beer bottle he was holding at Cordova's head. The bottle hit him. Fowler-Scholz then bear-hugged Cordova and the two wrestled around the hallway between the permanent bar and the front door of the sports bar.

Right after Fowler-Scholz hit Cordova with the beer bottle, Amber walked out of the bar and Montoya reached into his waistband and pulled out a gun. Ferrier and Gutierrez attempted to break up the fight. Ferrier tried to get at the fighting men by pushing Montoya aside. When he touched Montoya's left arm, Montoya pointed the gun at Ferrier's head and fired within four feet of him. Ferrier immediately went limp and

fell to the ground. He was hit four times in the head, three of which traveled through his brain killing him.

Upon hearing gun shots, everyone in the bar scrambled away from defendants. Montoya put the gun back in his waistband and walked toward Fowler-Scholz who was lying on the ground and on top of Cordova and Ferrier. Before he could get there, Stephen Walton, a security officer, came into the bar from a door located next to where the shooting occurred. Walton saw Montoya standing over bodies and grabbed Montoya's left shoulder. Montoya reached for his gun causing Walton to back into the doorway he had just entered through. Montoya shot at Walton two or three times, hitting him twice in the abdomen.

Montoya then put his hood up and the gun back in his waistband before trying to pull Fowler-Scholz onto his feet. Christina Cordova,[4] Cordova's wife, walked into the hall to check on her husband who was on the ground. Upon seeing Christina, Montoya pulled out his gun and fired at the ground one or two times hitting Christina in the foot before putting his gun back in his waistband. Montoya then continued trying to pull Fowler-Scholz off the ground. Walton entered the bar again through the door he had retreated through and shot at Montoya, hitting him in the jaw. After being hit, Montoya walked out the front door of the bar followed by a stumbling Fowler-Scholz.

Officers responded nearly immediately and tended to Cordova who had been shot three times on the side of his torso. They attempted to resuscitate him, but Cordova died from his injuries. Montoya was arrested outside of the bar within minutes of fleeing; his blood-alcohol level was 0.18. He was not wearing any red clothing, but a nine-millimeter handgun was taken from his possession. Fowler-Scholz's blood-alcohol level was .17.

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[4] We refer to Christina by her first name to avoid confusion, no disrespect is intended.

PRETRIAL FACTUAL BACKGROUND

Because Montoya challenges the trial court's denial of his motion to dismiss arguing the evidence presented at the preliminary hearing was insufficient to hold him to answer, we will relate the factual and procedural background relevant to address that claim and then address the claim itself. We will then relate the factual and procedural background relevant to defendants' trial and their remaining claims of error.

Defendants were charged with the murders of Ferrier and Cordova, and the prosecution alleged a multiple-murder special circumstance. They were also charged with attempted murder of Walton and assault with a firearm of Christina. It was also alleged as to the murder and attempted murder counts that defendants used a firearm within the meaning of section 12022.53, subdivisions (b) through (e)(1). Subdivision (e)(1) of section 12022.53 requires that the offense it enhances also be committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b). Fowler-Scholz was also charged with assault of Cordova with a deadly weapon, namely a beer bottle. The complaint alleged that defendants committed all the offenses for the benefit of a criminal street gang[5] and that Fowler-Scholz had previously been convicted of 12 strike offenses.[6]

At the preliminary hearing, the prosecution played the surveillance video of the shooting and called two Sacramento police detectives as witnesses. After the magistrate viewed the video, Sacramento Police Detective Larry Trimpey testified to the search of

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[5] At the time the preliminary hearing was held, the complaint named only Fowler-Scholz in the gang allegation. This was an oversight corrected after jury selection but before opening statements. Montoya conceded it was always the understanding of the parties the prosecution sought gang enhancements against him and did not object to the prosecutor's amendment of the information.

[6] The complaint also charged Amber with assault of Cordova with a deadly weapon. Amber was not a party to defendants' trial.

Fowler-Scholz's home, where he also found indicia Montoya lived there. In a bedroom containing Fowler-Scholz's belongings, Detective Trimpey found items indicating Fowler-Scholz was involved in gang activity. The items included a pillow with the term "Norte" and "XIV" embroidered on it in red, two red bandanas, one of which was pinned on the wall in the shape of a diamond, and red clothing. The other room appeared to be occupied by Montoya because it contained paperwork with his name on it. That room also had a pillow with "Norte" and "XIV" embroidered on it with red thread, red bandanas, and red clothing. Also in the room was a notebook with gang writing inside of it. In the kitchen, in the cabinet above the refrigerator, was a gun holster. A search of Montoya's phone recovered three photos of him displaying guns.

Sacramento Police Detective John Sample testified as the prosecution's gang expert. He testified Norteño gang members typically show their affiliation with the gang by wearing the color red and the Sureño street gang is their rival. In his opinion, both Fowler-Scholz and Montoya were active Norteño gang members, which the parties stipulated was a criminal street gang for the purposes of the gang enhancement allegation.

Detective Sample based his opinion of Fowler-Scholz's gang membership on his review of nine police reports. In those reports, Fowler-Scholz was documented admitting gang membership and having multiple gang-related tattoos, including "Norteño" on his back, "SACRA" on his stomach, "XIV" on his leg, and the numbers "1" and "4" on his arms. He has been known to wear the "Mongolian hairstyle," which is commonly worn by Norteño gang members and was photographed in prior booking photos wearing red clothing. Fowler-Scholz's display of a red diamond on the wall of his bedroom and his stomach tattoo led Detective Sample to conclude that Fowler-Scholz was an active member of the "Varrio Diamond Sacra" subset of the Norteño gang.

Fowler-Scholz had also associated with multiple Norteño gang members, including Montoya, Oscar Gaspar, and Reyna Viduya. Detective Sample reviewed photographs in which Fowler-Scholz was with other Norteño gang members displaying

gang signs, including the Varrio Diamond sign. Detective Sample also reviewed "several debriefs" from the Department of Corrections and Rehabilitation wherein Fowler-Scholz was named as a "northern structure gang member" while serving a prior prison sentence. A "northern structure gang member" is someone who works for the Nuestra Familia, the prison gang associated with the Norteño criminal street gang. Police reports also revealed that Fowler-Scholz committed crimes involving guns, which further led Detective Sample to believe he was a member of the Norteño gang.

In Detective Sample's opinion, Montoya was also an active Norteño gang member. This opinion was based on four police reports, which affiliated Montoya with a Norteño subset in East Oakland. Montoya had a tattoo of a Mongolian warrior (a Norteño symbol) on his right arm with a "2" and "7" appearing near the warrior. The numbers on Montoya's tattoo represent the 27th Avenue Norteño street gang, from the Murder Dubs neighborhood of Oakland.[7]

Montoya had also been involved in gang-related activity in the past. In 2006, he and a Sureño gang member fought after both men displayed gang signs. During the fight, Montoya was wearing red clothing. At the time of the offense, Montoya denied being a gang member or affiliate and claimed the two fought after flipping each other off. Montoya was also documented as being present during the gang-related shooting of his friend Andrade Cruise in Oakland. Montoya and Cruise were walking when Cruise was shot by a member of the 51st Avenue Norteños after Montoya yelled to the shooter that Cruise was not a "Border Brother." Border Brothers are rivals of the Norteño gang in the Oakland area.

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[7] During a booking interview, Montoya admitted Norteño gang membership. We do not rely on these statements because, as the prosecution later conceded, those statements were inadmissible in violation of *Miranda v. Arizona* (1966) 384 U.S. 463 [16 L.Ed.2d 694]. (See *People v. Elizalde* (2015) 61 Cal.4th 523, 540.)

Based on his review of the reports and his conversations with other officers, Detective Sample believed the charged offenses were committed for the benefit of a criminal street gang. He described the benefit as follows: "It basically is an enhancement of the reputation for violence. The gang puts its reputation out there to be feared and intimidated. And there is nothing more fearful than the reputation of murder, especially in a public setting. [¶] We have two Norteños working in conjunction with one another to commit a crime like this, a crime of violence like this. They're not only receiving an enhanced reputation for themselves but they're walking ambassadors for their gang, the Norteño gang, and that gang receives the same reputation for violence, making them more feared not only in the community but the rivals." The shooting was in a public venue with a large amount of people present. "[T]he more eyes who see what the Norteños are capable of, the more people [who] put word of mouth out there [that] they're capable of this violence. It spreads the fear and intimidation that the gang prides itself on."

Both Detectives Sample and Trimpey acknowledged that neither defendant wore gang-related clothing at the time of the shooting. They also acknowledged that no witness made statements to police indicating they thought the shooting was gang related. No witness mentioned hearing terms of gang allegiance or seeing defendants display gang signs. Detective Sample, however, still believed the offenses were gang related because a bartender told officers after the shooting that Fowler-Scholz had repeatedly shown the "SACRA" tattoo on his stomach to the people around him and bragged that he was from Sacramento and his friends were from East Oakland. In Detective Sample's opinion, Fowler-Scholz repeatedly lifted his shirt "because he wanted people to see his [SACRA] tattoo. [¶] For me as a gang detective that means something. He has that tattoo to show affiliation to the Norteño gang. He is in the bar talking about being -- his friends being from East Oakland and him from Sacramento and showing off his SACRA

sign. That for me shows gang affiliation, showing people where he is from, what set he represents and he is showing the tattoo."

Montoya later filed a motion to dismiss the gang-related firearm allegations and the gang allegations. Montoya argued the evidence presented at the preliminary hearing was insufficient to hold him to answer because the prosecution did not show he committed the offenses for the benefit of a criminal street gang. The trial court denied Montoya's motion.

DISCUSSION

The Evidence Presented At The Preliminary Hearing Was Sufficient To Hold Montoya To Answer On The Gang Allegations

At a preliminary hearing, the magistrate is tasked with determining whether there is sufficient cause to believe the defendant is guilty of the charged offense. (§§ 871, 872, subd. (a).) " '[S]ufficient cause' " is " ' reasonable and probable cause' " or "a state of facts as would lead a [person] of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (*People v. Uhlemann* (1973) 9 Cal.3d 662, 667.) This is an " 'exceedingly low' " standard. (*People v. Chapple* (2006) 138 Cal.App.4th 540, 545.) "An information should be set aside 'only when there is a total absence of evidence to support a necessary element of the offense charged.' [Citation.] The requisite showing may be established by circumstantial evidence." (*Id*. at pp. 545-546.) These standards similarly apply to enhancement allegations. (*Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 842, 846.)

In reviewing a motion to dismiss, we " ' "directly review[] the determination of the magistrate." [Citations.] We conduct an independent review of the evidence, but will not substitute our judgment for that of the magistrate as to the credibility or weight of the evidence. [Citations.]' [Citation.] '[I]f there is some evidence to support the information, the court will not inquire into its sufficiency. [Citations.] Every legitimate

inference that may be drawn from the evidence must be drawn in favor of the information.' " (*People v. Chapple*, *supra*, 138 Cal.App.4th at p. 546.)

The prosecution has the burden of proving both prongs of the gang enhancement pursuant to section 186.22, subdivision (b)(1). (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484.) "First, the prosecution is required to prove that the underlying felonies were 'committed for the benefit of, at the direction of, or in association with any criminal street gang.' [Citation.] Second, there must be evidence that the crimes were committed 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " (*People v. Rios* (2013) 222 Cal.App.4th 542, 561.)

The prosecution may rely on expert testimony regarding criminal street gangs to establish a gang enhancement. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) However, the expert's testimony must be grounded in admissible evidence. "[P]urely conclusory and factually unsupported opinions" that the charged crimes are for the benefit of the gang because committing crimes enhance the gang's reputation are insufficient to support a gang allegation. (*People v. Ramirez* (2016) 244 Cal.App.4th 800, 819-820.)

Montoya attacks the magistrate's finding of sufficient cause as to both prongs of the gang allegation arguing Detective Sample's opinion that the crimes were committed to benefit the Norteño street gang was factually unsupported. He relies on multiple cases analyzing the showing required to sustain a true finding that a crime was committed for the benefit of a criminal street gang and, without citation to authority, tells us "[t]hese rules apply to preliminary hearings." Not so. The showing required to support a true finding is the same showing required to sustain a conviction (*People v. Wilson* (2008) 44 Cal.4th 758, 806); "that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt" (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*)). Conversely, sufficient cause to hold a defendant over for trial is an "exceedingly low" standard and the

threshold to demonstrate error is daunting. (*People v. Chapple*, *supra*, 138 Cal.App.4th at p. 545.) Indeed, if some evidence exists to support the charges and enhancements alleged in the information, then we must affirm the magistrate's holding order. (*Id*. at p. 546.) Only a preliminary hearing characterized by the "total absence of evidence" will lead to reversal. (*People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1226.)

One example of a "total absence of evidence" can be found in *Ramirez*, on which Montoya also relies. In *Ramirez*, the defendants, who were boyfriend and girlfriend, assaulted and attempted to murder their neighbors. There had been a long-term disagreement between the victim and boyfriend, but no testimony established its cause. (*People v. Ramirez*, *supra*, 244 Cal.App.4th pp. 803-804.) The gang expert believed boyfriend to be an active Sureño gang member and based that opinion on boyfriend's tattoos and a single photo. (*Id*. at pp. 804, 807-808.) His tattoos, however, did not overtly declare his allegiance to the Sureño gang but implied that allegiance through symbols such as three dots, Aztec art, a southern star, and an angel with 13 wings. (*Id.* at pp. 807-811.) Boyfriend also posted a photo on social media in which he wore all blue -- a color aligned with Sureño membership. (*Id.* at p. 808.) The expert thought girlfriend to be a gang associate and based that opinion on her affiliation with boyfriend and a tattoo boyfriend had that the expert believed to be girlfriend's gang moniker. (*Id.* at p. 809.)

As to the benefit their crime conferred on the Sureño gang, the expert testified in whole: "This alleged crime benefits the Surenos. The more violent crime Sureno gang members are willing to commit, the larger their reputation will grow. In gang subculture, violent crimes are revered and encouraged when compared to the general public they would be frowned upon. This reputation increases intimidation that the gang is able to employ over other people, the general public, other gangs, and even to law enforcement. If a gang or a gang member has such large reputation as being willing to commit a violent crime such as shooting somebody in the face, there's a very good chance that nobody is

going to report this person, try to contact this person, and stop him from committing any criminal activity." (*People v. Ramirez, supra*, 244 Cal.App.4th at pp. 808-809.)

The appellate court found this testimony insufficient to hold defendants to answer. (*People v. Ramirez, supra*, 244 Cal.App.4th at p. 818.) As to the first prong of the gang enhancement, the testimony that the crimes benefited the Sureños "because they increase the Sureños' reputation," was insufficient because no other evidence established the charged crimes were gang related. (*Id.* at p. 819.) While an expert's opinion that particular criminal conduct benefited a gang " 'can be sufficient to raise the inference that the conduct was "committed for the benefit of . . . a[] criminal street gang," ' " that inference is not raised when "no gang signs were flashed, no gang names were called out, and no gang attire was worn. Plus, while there is some evidence [boyfriend] actually is a gang member and [girlfriend] might be a gang sympathizer, there is no evidence [the victims] are gang members. Likewise, there is no evidence the disputes between [the victims] on the one hand, and [the defendants] on the other, had anything to do with any gang." (*Ibid.*)

Evidence supporting the second prong was insufficient for similar reasons. After acknowledging the specific intent required for the gang enhancement can be inferred from a defendant's intended commission of a crime with a known gang member, the court found the preliminary hearing testimony did not raise such an inference because the evidence was insufficient to establish either defendant was a known Sureño gang member. (*People v. Ramirez, supra*, 244 Cal.App.4th at p. 819.)

Unlike *Ramirez*, Montoya's case is not a case that presents a "total absence of evidence to support" an element of the gang allegation. (*People v. Superior Court (Jurado), supra*, 4 Cal.App.4th at p. 1226.) As to the first prong, or the gang-related prong, there was evidence presented supporting Detective Sample's opinion the shooting benefited the Norteño gang by enhancing its reputation for violence within the community and by enhancing defendants' reputation within their gang. While true no

evidence established defendants' victims were gang members or that defendants flashed gang signs, yelled gang allegiance, or wore gang attire when the altercation occurred, there existed evidence that Fowler-Scholz bragged about his and Montoya's gang affiliation at the location of the shooting, close in time to the shooting, and to the people who witnessed the shooting. Indeed, Fowler-Scholz was seen showing off his gang-related tattoo multiple times and talking with people about where he and Montoya were from. Detective Sample testified this behavior served to announce defendants' loyalty to their gang to those around them. The people who saw and heard Fowler-Scholz's claims of affiliation then saw defendants participate in a public shooting, thereby increasing the gang's and defendants' reputation for violence among those people. Thus, Detective Sample's opinion was supported by "some evidence," unlike the expert's testimony in *Ramirez* where the record of the altercation was devoid of any evidence showing a gang connection. (*People v. Ramirez*, *supra*, 244 Cal.App.4th at p. 818.)

Some evidence also supports the second, or specific intent, prong of the gang allegations. There is no requirement a defendant have the specific intent to benefit the gang; what is required is a defendant's "specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b); *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) The specific intent prong "is unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Albillar*, *supra*, 51 Cal.4th at p. 66.) Whenever "substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Id.* at p. 68.) While this rule addresses the standard to sustain a true finding, it stands to reason that some evidence establishing the same -- that Montoya intended and did commit the felony with

known gang members -- would be sufficient to uphold the denial of a motion to dismiss. Here, the prosecution made a sufficient showing.

Montoya began shooting in the sports bar after Fowler-Scholz initiated a physical assault on Cordova, providing some evidence Montoya intended to commit a felony with Fowler-Scholz. Some evidence further established both Montoya and Fowler-Scholz were Norteño gang members, fulfilling the requirement Montoya assisted criminal conduct by gang members. Fowler-Scholz admitted Norteño gang membership in the past and had committed crimes and had police contacts involving gang activity. Montoya had multiple contacts involving Norteño gang activity. Both defendants also had tattoos identifying their gang allegiance. While Montoya's tattoo was not overtly gang related, Fowler-Scholz's tattoos were. Further, both defendants had been documented wearing Norteño gang clothing in the past and owning Norteño clothing at the time of the offense. From this evidence, sufficient cause supported a finding that both defendants were Norteño gang members.

Montoya argues the showing for both prongs is insufficient under *Prunty* because the evidence showed defendants were involved in different Norteño subsets, requiring the prosecution to show an " 'associational or organizational connection uniting those subsets' " to the larger Norteño gang the prosecution alleged defendants benefited in the allegation. (*People v. Prunty* (2015) 62 Cal.4th 59.) Montoya argues the connection required by *Prunty* was absent, thus while the prosecution may have shown the offenses were gang related and defendants were gang members, no evidence showed they acted to benefit and were members of the gang alleged in the allegation -- the Norteños. Again, Montoya argues the wrong standard. *Prunty* laid out the showing required to sustain a true finding that the gang alleged is actually a criminal street gang within the meaning of the statute. (*Id*. at p. 71.) Here, the parties *stipulated* Norteños is a criminal street gang for the purposes of the gang allegations. In any event, a sufficient showing was made for

the purposes of a preliminary hearing that defendants' subsets were part of the Norteño umbrella gang.

As discussed, evidence established Fowler-Scholz was a member of the Varrio Diamond Sacra subset of the Norteño criminal street gang. This gang shared the same colors, symbols, and enemies as the larger Norteño gang. Fowler-Scholz even had those colors displayed in his home and those symbols tattooed on his body. When Fowler-Scholz previously went to prison, he rose in the ranks of the Norteño-affiliated prison gang, showing some organizational component between his Varrio Diamond Sacra subset and the Norteño umbrella gang. While shared colors, symbols, and enemies are insufficient to sustain a true finding (*People v. Prunty*, *supra*, 62 Cal.4th at pp. 74-75), here it is sufficient to sustain a holding order when viewed with Fowler-Scholz's involvement in the larger Norteño gang structure while in prison.

The admissible evidence regarding Montoya's gang affiliation showed he identified with the 27th Avenue Norteños from the Murder Dubs neighborhood in Oakland. As a member of that subset, he wore Norteño colors and symbols. While living in Sacramento, Montoya was roommates with Fowler-Scholz and a search of the house they shared revealed in each of defendants' bedrooms a pillow with Norteño colors and symbols, along with other Norteño gang paraphernalia including a notebook with Norteño drawings. Montoya's living arrangement with Fowler-Scholz, along with his possession of Norteño paraphernalia, showed an association with Fowler-Scholz's subset that went beyond shared colors, symbols, and enemies and could be attributed to the larger Norteño gang structure. Thus, sufficient cause connected Montoya's gang membership to Fowler-Scholz's and the Norteño umbrella gang the prosecution alleged defendants benefited during the course of their offenses.

We now address defendants' remaining claims and the relevant facts and trial proceedings.

TRIAL FACTUAL BACKGROUND

I

The Shooting

Unlike the preliminary hearing, the prosecutor elicited testimony at trial from witnesses to the shooting in addition to playing the video surveillance footage. Manual Gutierrez and Tamara Woods testified that defendants' group grabbed their attention when they entered the bar because they wore "baggy clothing" and looked "thuggish" unlike everyone else in the bar who dressed more formally for New Year's Eve. A photo of Fowler-Scholz from the night of the shooting showed he wore a red shirt under his white sweatshirt and the shirt could be seen hanging out the bottom of his sweatshirt and at the neckline. Waitress Julie Ramos testified she heard Fowler-Scholz say he was in Sacramento from the Oakland area sometime before the shooting. Walton testified he spoke to Fowler-Scholz the night of the shooting but not Montoya. Walton was trying to get Fowler-Scholz to calm down because he was extremely loud and verbally challenging Walton. Walton, however, did not think Fowler-Scholz was serious and thought his behavior was usual for a night like New Year's Eve when everyone was drinking.

Irene Chung was a bartender at the sports bar and served defendants' group at the temporary drink station they ordered from and stood next to once arriving at the bar. She testified the group started drinking early and heavily with Fowler-Scholz ordering shots of Hennessy and bottles of beer for everyone. Defendants and the other members of their group were flirting with her and appeared to be having a good time. At one point Fowler-Scholz flashed his tattoo at Chung by lifting his shirt and showing her the tattoo on his stomach. Chung did not know who else saw Fowler-Scholz flash his tattoo or who was around when he did so. Fowler-Scholz also told Chung he was from East Oakland and Sacramento.

While serving the group, Chung did not speak with Montoya or get a good look at him because he kept his hood up for nearly the entire night. Right before the shooting,

Amber came up to the bar alone and complained to Chung that someone had spilled a drink on her. Amber looked "very upset about it." After telling Chung about the spill, Fowler-Scholz returned to the temporary bar and Amber told him about the spill as well. Fowler-Scholz asked Amber if she wanted him to punch somebody. She said yes, and they left the temporary bar with Montoya. Based on that interaction, Chung thought Fowler-Scholz may start a fight so she went to alert security. She did not get the impression there was about to be a shooting.

II

Gang Evidence

A

Fowler-Scholz And The Varrio Diamond Sacra Subset

Detective Sample testified again for the prosecution as an expert of Sacramento street gangs and expanded upon the testimony he offered at the preliminary hearing. In Sacramento there are two Hispanic gangs -- the Norteños and the Sureños who are rivals. Those gangs break down further into subsets. Norteños generally associate with the color red and anything to do with the north, the letter "N," or the number 14. The current trend is for gang members to wear subtle indicators of their gang membership, instead of wearing copious amounts of gang colors as was done in the past. There are certain cities that have come to represent the Norteño street gang, while other cities have come to represent the Sureño street gang. For example, Sacramento is known as one of the Norteño "strong holds" because it is the capital of California and a large Northern California city. It is common for Norteños to use the term Sacramento or the area code "916" to represent their gang affiliation. Sureño gang members similarly use Los Angeles as a symbol of their gang affiliation.

There are over a dozen Norteño subsets across Sacramento, including the Varrio Diamond Sacra subset. In addition to identifying with common Norteño symbols, the Diamond also associate with the number 17, because 17th Avenue runs through their turf,

and the number 34, because a park in their territory is located on 34th Street. They also associate with anything having to do with the diamond shape. For example, the gang's hand signal is a diamond made by connecting two peace signs a person makes with his or her index and middle finger. The Diamond also use the symbol "VDS" for Varrio Diamond Sacra.

The primary activities of the Diamond is firearm possession, assaults with a firearm or other weapon, drive-by shootings, murder, narcotic sales of methamphetamine and marijuana, robbery, and vehicle theft. Detective Sample testified to three predicate offenses committed by Diamond gang members for the purpose of proving the gang is a criminal street gang within the meaning of the statute. The first offense involved Oscar Gaspar, who was convicted of first degree murder in June 2013 after shooting someone his girlfriend told him sexually assaulted her. After the shooting, Gaspar and Fowler-Scholz texted with each other and Gaspar was later arrested at Fowler-Scholz's house for the murder. At the time of the offense, Gaspar was a well-known Varrio Diamond Sacra gang member, with multiple tattoos signifying his loyalty to the Diamond specifically, and one tattoo signifying his loyalty to the Norteños generally. Gaspar also admitted gang membership and officers found Diamond graffiti in his jail cell after he was arrested for the murder. Gaspar was also found communicating with other Norteño gang members in jail by passing a "kite," or a small note, that contained a list of reliable gang members currently in jail. Gaspar's moniker Grumpy appeared on the confiscated list.

The second predicate offense involved Andrew Martin, who was convicted of attempted murder with a gang enhancement in December 2010. Martin and another Varrio Diamond Sacra gang member were in a convenience store when they saw other Norteño gang members affiliated with a different Sacramento subset. Martin asked the other Norteño subset members where they were from and told them they were in Diamond territory. In the parking lot a short time later, Martin shot one of the other Norteño gang members in the stomach. At the time of the shooting, Martin had gang-

related tattoos, including the number 17 with diamond shapes drawn into the numbers. He also admitted his gang membership and had associated with other Varrio Diamond Sacra gang members in the past.

The third predicate offense involved Fowler-Scholz's ex-girlfriend Reyna Viduya, who was convicted of possession of a stolen firearm. The conviction resulted from a car stop in August 2012, while Viduya rode in the back passenger seat of a car also occupied by Fowler-Scholz, Tonde Brown,[8] and Clifton Riddle after the group had been out drinking. Upon a search of the car, officers found a loaded gun under the front passenger seat where Fowler-Scholz had been sitting. Viduya claimed she "took the fall" for the gun by telling officers it was hers, when in fact she did not know who actually owned the gun. She did this because she did not want Fowler-Scholz to be held responsible in light of his criminal history. Viduya, however, told the prosecution's investigator that the gun belonged to Fowler-Scholz. In Detective Sample's opinion, Viduya was a Diamond gang member because she admitted four years of Norteño gang membership at the time of the offense and she was associating with Fowler-Scholz, a known Diamond gang member.

Detective Sample also testified about the role of guns in gang life. According to him, "a firearm is pretty much a tool of the trade of a gang member. It's like a carpenter and hammer. It's how they conduct most of their business, their reputation for violence. It's one of the -- the best ways for them to get that violent point across. It's the most efficient way to carry out violence for them." Detective Sample continued by explaining that not all Norteño gang members would be expected to carry a weapon if in public with

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[8] Brown was a validated member of the 29th Street Garden Block Crips, a subset of an African American criminal street gang. The fact that a Crip gang member associated with Fowler-Scholz was relevant to Detective Sample because gang members generally "want to be around people [who are] gonna be trusted, [who] aren't gonna snitch, have loyalty, ideals, and gang members of African American gangs, Asian gangs, and Hispanic gangs are fairly similar in those ideals of not snitching, loyalty, respect, the same concepts apply in those other gangs also."

other Norteño gang members. But at least one of those gang members would likely be carrying a gun for the group. "[T]ypically the violence and the firearm is going to be delegated to a younger person [who is] trying to prove [himself or herself] into the gang or younger persons who necessarily don't have the same exposure to prison time . . . ."

In Detective Sample's opinion, Fowler-Scholz is an active Norteño gang member with specific loyalty to the Varrio Diamond Sacra subset. He based this opinion on Fowler-Scholz's tattoos, evidence recovered from his home, and his associations with other Diamond gang members. Fowler-Scholz's tattoos identified him as a Varrio Diamond and Norteño gang member. On his stomach was the term "SACRA" representing Sacramento and the Varrio Diamond Sacra subset. He also had the term "Norteño" tattooed on his back, "XIV" on his left leg, the number one on his right shoulder and the number four on his left shoulder, representing the number 14.

Upon a search of Fowler-Scholz's home, officers found a diamond-shaped red bandana hanging on the wall of his bedroom, which is a "proud symbol" of Diamond membership. Multiple other red bandanas were collected from the room along with multiple items of red clothing and a red beanie with a Huelga bird on it, which is a symbol associated with the Norteño gang. One red bandana was folded in a common folding pattern among Norteño gang members that makes it easier to fit the bandana in a pocket so that it can stick out for people to see.

Officers also found several photographs of Fowler-Scholz wherein he demonstrated his gang affiliation. In one photo of him and several people, everyone wore red clothing including Fowler-Scholz who also wore a Cincinnati Reds baseball cap. Another person in the photo wore a shirt with a Huelga bird on it. In a framed photo found on Fowler-Scholz's dresser, he is seen displaying his "SACRA" stomach tattoo. In a black photo album entitled "party time," officers found multiple other photographs of Fowler-Scholz displaying gang signs with other people. Also in the bedroom was a pillow that was solid red on the back and had "Norte XIV" stitched in red on the front.

Officers also found other indicia of Norteño gang affiliation, including a keychain and a restaurant placard. In a kitchen cabinet, officers found a nylon gun holster; however, they did not find any guns or ammunition in the house.

Fowler-Scholz associated with known Varrio Diamond Sacra gang members, including Gaspar who Fowler-Scholz helped after Gaspar committed murder. This type of association showed a high level of trust between Fowler-Scholz and a Diamond gang member. Fowler-Scholz also lived in close proximity to the central territory of Varrio Diamond Sacra and near crimes committed by other Diamond gang members.

B

Montoya And The 27th Avenue Norteño Subset

In Detective Sample's opinion Montoya is a member of the 27th Avenue Norteños in East Oakland. He based this opinion on Oakland Police Sergeant Douglass Keely's testimony about Montoya's gang contacts and the Norteño gang culture in Oakland, as well as additional evidence collected from defendants' house and Montoya's tattoos. In Oakland there are three Hispanic gangs -- the Norteños, Sureños, and Border Brothers -- each with several subsets. The Murder Dubs region of East Oakland is between 20th and 29th Avenues and contains multiple Norteño subsets, including the 27th Avenue Norteños. Norteños in Oakland associate with the color red and the number 14, which represents "N," the 14th letter of the alphabet. Many gang members in Oakland do not wear their gang colors prominently, but instead wear red as an accessory color. For example, many Norteño gang members will wear a red belt or red shoe laces and then "flash [their] power" at someone by showing off the red article of clothing. When they do that "you know what that person is telling you. You know, trouble is coming." Sergeant Keely has also seen gang members "flash [their] power" by flashing their gang-related tattoos. Generally, gang members want people to know who they are and who they are associated with, unless they are in another gang's territory.

Sergeant Keely also believed Montoya to be a member of the 27th Avenue Norteños. He and Detective Sample based this opinion on photographs of Montoya, Montoya's tattoos, and a 2006 police report. The 2006 police report described a fight between Montoya and a Sureño gang member when Montoya was in high school. The altercation began when the Sureño gang member drove past Montoya in a parking lot and yelled allegiance to the Sureño gang while displaying a Sureño gang sign. Montoya responded by flipping off the Sureño gang member. The next day, Montoya confronted the Sureño gang member about the reason he was targeted. Montoya punched the Sureño gang member, according to Montoya, after the Sureño gang member acted like he was going to punch Montoya. During the fight, the Sureño gang member's girlfriend called Montoya a "chap," which is a derogatory term for a Norteño gang member. At the time of the fight, Montoya denied being a gang member; however, he wore a red shirt and red and white shoes during the fight.

At the time of the current offenses, Montoya had a tattoo on his arm showing a warrior with a Mongolian haircut and a "2" and "7" in the face of the warrior. Mongolian warriors are symbols among Norteño gang members who are foot soldiers for the Nuestra Familia prison gang, and the "2" and "7" represent Montoya's subset of the 27th Avenue Norteños. After his arrest for the current offenses, Montoya got an additional tattoo of a single dot on one hand and four dots on the other -- representing the number 14.

In the photographs both Sergeant Keely and Detective Sample reviewed, Montoya can be seen displaying guns. In one photo, he is with two men on a city street, while in the other he is making a hand sign and the person he is with is wearing a red bandana. In the Oakland area, it is very common for gang members to pose in photos with guns and red bandanas to promote gang affiliation and intimidate or strike fear in the community and rival gang members. The red bandana is one of the strongest symbols of the Norteño gang because everyone on the streets of Oakland knows what it means. Instilling fear is how each gang controls turf. As Sergeant Keely explained, "[y]ou know that they have

guns. You know they're ruthless. You know that they will shoot you. Oakland is famous for snitches getting stitches and those kinds of reputation that they put out there, that if you tell the police, hey, these guys are doing criminal activity, you have to fear that these people are going to shoot you the second the police drive off the block." In gang culture guns are "the tool of the trade" and "the ultimate power. You kill. You don't have to have overwhelming strength, everything like that. It's fear and intimidation." Gang members collectively own guns and commonly pass guns around from member to member. In Oakland, if two or more gang members are together, it is common for at least one of them to be carrying a gun.

Upon a search of the bedroom in Fowler-Scholz's house, which Montoya lived in for several months before the murder, officers found paperwork appearing to belong to him; however, they also found items appearing to belong to "Jessie Yanez." Officers also found multiple items of clothing in varying sizes with red as a main color, which is common among Norteño gang members. They discovered a notebook with drawings of women and eight pages of innocuous notes, including one instance of the term "Norte" written inside. The notebook also had "Jessie Yanez" written in it.

C

Benefit Of A Criminal Street Gang

In Detective Sample's opinion defendants committed the shooting at the sports bar for the benefit of the Norteño criminal street gang. "This is a very violent crime, a shooting, murder, and multiple people being shot, a very violent crime. And when Norteño members are involved in a crime like this, it enhances their reputation for violence, making them more feared by their rivals, enemy gangs, as well as any communities that these Norteño gang members occupy. That reputation for violence benefits them by making them more feared by all those individuals, but it also prevents oftentimes additional crimes from being reported by these Nor -- by these Norteño gangs. When these Norteño gangs commit additional crimes, people use this reputation for

violence to decide I don't want to testify against these guys because these guys are very violen[t]."

Further, defendants committed the assault and shooting in response to a perceived act of disrespect. Disrespect, in the gang culture, is met with a swift response that is "oftentimes harsh violence." "It's sort of a one-up kind of situation. If you call me a name, I'm gonna pull out a weapon and use my weapon to show you . . . that you will respect me."

The fact that Fowler-Scholz wore a red shirt beneath his white sweatshirt during the shooting functioned to identify him as a gang member who needed to be feared. "Wearing those colors during the commission of a crime like this, you're sort of taking on that identification of Norteños being responsible for this particular crime." Additionally, Fowler-Scholz flashed his SACRA tattoo multiple times, "showing who [he is] affiliated with . . . showing pride in [his] gang. Especially a tattoo this size, that's pretty big tattoo with five letters. It shows where [his] heart's at . . . what [his] affiliations with." Detective Sample explained, "it's another form of communication of who's responsible for this particular crime, Varrio Diamonds Sacra in this particular case and an inference to that particular subset." It is common for gang members to boast about the area they are from to nongang members because the goal is to show pride in affiliation.

It is also common for members of different Norteño subsets to commit crimes together. "[The] Norteno [g]ang is connected on many bases, through neighborhoods, through families, through the prison system. [¶] The structure of the Norteno [g]ang as it relates to the prison gangs is still very strong with the Nuestra Familia, and Norteños still have many bonds and still have many communications with one another. [¶] The Nuestra Familia and Northern Structure still set up regiments or groups from the Nuestra Familia basically directing Norteno groups to sell narcotics, to commit assaults, various activities. [¶] And these are investigations that I've participated in to witness these

particular regiments being set up in -- here in Sacramento on multiple occasions. [¶] So the connection goes to -- from the high prison system, down to the street prison system, and even further past that to smaller subsets. [¶] So these particular individuals have lots of connections coming from various sources."

It is also common for a Norteño who comes to a new town to start associating with a Norteño subset based in the new town. For example, Detective Sample investigated a case involving Jorge Castaneda who moved to Sacramento from Vacaville where he was a Norteño gang member. Upon moving to Sacramento, Castaneda began to associate with the Westgate Norteños from the Natomas area and committed the murder of a Sureño gang member with that gang. Similarly, after Montoya moved to Sacramento, he moved into a house with Fowler-Scholz, a Varrio Diamond Sacra member. To Detective Sample, this showed Montoya intended to continue his affiliation and involvement with the Norteño gang because he sought out the company of Norteño gang members.

III

Fowler-Scholz's Prior Acts

The prosecution offered four of Fowler-Scholz's prior acts involving gangs and guns to prove he knew the natural and probable consequence of his assault on Cordova would be murder and attempted murder. Relying on *People v. Godinez* (1992) 2 Cal.App.4th 492, the prosecution argued the prior acts were relevant to show Fowler-Scholz could foresee the natural and probable consequences of his assault because he is intimately aware of the dangers and culture of gangs and "[a]s [his] history shows, gangs and guns go hand in hand."

Fowler-Scholz objected to the admission of these prior acts arguing they constituted inadmissible character evidence under Evidence Code section 1101 and were inadmissible under Evidence Code section 352. Montoya also objected to the admission of Fowler-Scholz's prior acts to the extent the prosecutor would seek admission of the acts in front of his jury.

The court admitted three prior acts because they were relevant "on the issue of the Defendant Fowler-Scholz[']s state of mind, knowledge, and intent." Two of the three prior acts were admitted in front of Montoya's jury, one of which was the predicate offense involving Viduya where she took the blame for possessing a gun found under the passenger seat of a car Fowler-Scholz recently occupied. The other prior act admitted into evidence in front of Montoya's jury involved two text message conversations, one between Amber and Fowler-Scholz and the other between Amber and her aunt. The conversation between Fowler-Scholz and Amber pertained to their strained marriage and the women Fowler-Scholz may be dating. While texting with Fowler-Scholz, Amber also texted with her aunt about her conversation with Fowler-Scholz. After being told Fowler-Scholz was drunk while texting Amber, Amber's aunt asked if it was a good idea for him to be watching his children. Amber responded that she did not know and "really don't care right now either. I have his gun here." The whole of Amber's and her aunt's conversation was read into evidence, wherein Amber's aunt tells Amber that she did not have a place to live at the moment and could not stay with Amber because she thought Fowler-Scholz was scary.

The third prior act was admitted as to only Fowler-Scholz and outside the presence of the jury. In 1999, Fowler-Scholz, his brother, Amber, and Burton Madrigal were driving to a rave[9] and decided to rob someone because they needed money. The group drove to a restaurant and Fowler-Scholz and his brother got out of the car to commit the robbery while Amber and Madrigal stayed in the car. Fowler-Scholz and his brother went to the back of the restaurant and after a few minutes Madrigal followed. When Madrigal turned the corner of the building, he saw Fowler-Scholz's brother punching the person at whom Fowler-Scholz was pointing a gun. After the robbery, the three men ran

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9 A rave is an organized dance party at a nightclub.

back to the car. Before they got there, someone ran out of the restaurant and Fowler-Scholz fired a shot at that person. Amber drove the car away from the robbery and the car was eventually stopped by law enforcement officers.

Madrigal said he was the one who robbed the victim and pled guilty to robbery with a gun enhancement, even though that was not true. At the time of the offense, Fowler-Scholz, unlike Madrigal, had recently been released from prison and was a three-strike offender. Also at the time of the offense, Madrigal had a tattoo on his hand to represent the Norteño street gang; however, he testified he was not actively involved in the gang at the time. He was aware at the time though that Fowler-Scholz claimed membership to the Norteño gang.

IV

The Prosecutor's Closing Argument

The prosecutor's strategy to gain a conviction was clear from the opening statements. After describing defendants' victims, the prosecutor continued: "This trial is also not only going to be about the victims in this case, but there will be a focus in regards to who these defendants were, because that will ultimately be important when you judge why this happened, because this senseless violence doesn't just occur for no reason. [¶] The evidence will show it happened because of Nortenos. You will learn evidence regarding the Norteno street gang. [¶] It will be a mind set [*sic*] that's so twisted, that normal people won't understand it. It's a set of beliefs, a culture that's outside of the norm. [¶] You'll hear from an expert [who] will talk about it and the importance of that gang and what's important in regards to the gang itself."

During closing argument to the jury in Montoya's case, the prosecutor's strategy remained the same. He argued the murders of Ferrier and Cordova were "cold" and "calculated" and that "the explanation [for] why it happened was definitely proven in this case." The shooting of four people was not the result of "some bar fight gone bad," but the result of who defendants were. "For them -- and we talk about gangs. It's interesting

cause we talk about gangs. You know, in the courtroom you want to hide, right? We're not gang members. My goodness, that's all we talk about is gangs. [¶] But on the streets there's a reason why they carried themselves with confidence in that bar that day. There's a reason why defendant Fowler-Scholz, Defendant Montoya, and the other members of their group are so boisterous. It's not 'cause they're out trying to have a good time. I mean they are in their own little world. But they're gangsters. They wear their color red for a reason. They're proud of what they are. He's armed with a loaded semi-automatic weapon in his waistband, he has no concerns. So when you see their activities and how they're dancing, and this supposed great time and high-fives, that confidence comes with what they are and what they represent."

The prosecutor argued that Montoya's premeditation and deliberation could be inferred by the "culture and mind-set" of the gang Montoya belonged to. The prosecutor did this by analogizing Montoya's gang affiliation and the murders to his and his wife's decision to by a statue for their garden. The argument begins with the prosecutor's intent to buy a statue at Home Depot, but he ultimately decided not to once he saw how expensive the statue was. Then one day, as he was driving around town, he stopped at a garage sale and saw the same statue for far cheaper than it was sold for at Home Depot. To anyone looking at the prosecutor buying the statue at the time, this may be an impulsive decision. But what they do not know is that the prosecutor had been thinking about buying this statue for months and was only waiting for the right opportunity. The garage sale presented that opportunity to the prosecutor, like the bar fight presented that opportunity to Montoya to carry out the murders.

"These are gangsters at play, right? Armed, as Detective Sample said, like a carpenter with a hammer, like a plumber with a wrench, a gangster and his gun." The prosecutor maintained Montoya's intent was clear from the video of the shooting and the jury need not take into account Montoya's experience with gangs. He made the point by going into a detailed analysis of the surveillance footage and the moment where it

appeared Montoya was premeditating and deliberating his next move, which was to engage in a public shooting.

However, "when you talk about premeditation and deliberation, my goodness, he walked in with that mind-set . . . . He knew what he was gonna do. That's what he was built for, that's what -- the lifestyle he had adopted." After arguing against a finding that Montoya's intoxication negated his premeditation and deliberation, the prosecutor concluded "[t]he reality of what happened that night is this defendant, Defendant Montoya, these horrible acts that we saw on video, are acts that this defendant and the gang that he pledges to, that's their thing. That's what Detective Sample told you: Norteños in Sacramento, one of their primary activities, murder, guns. That's the reality of what we're dealing with here. That's why a spilled drink in a bar can end up in two murders because of the mind-set that he walks in that bar with." After arguing for true findings on the gang enhancements, the prosecutor said, "premeditation and deliberation didn't start when [Montoya] first put the gun in his pants when he left the house. It didn't start when he pulled it out for the first time. It didn't start when he started to pull the trigger at Daniel Ferrier. Premeditation and deliberation for this defendant started months and years before, starting back -- going back to 2006 with his Norteño lifestyle, this belief. Remember, Murdda Dubs, not a coincidence that's the gang he -- he's from. On the wall, 187, murder all day, that's the gang he is from. That's how he comes to us. [¶] So when did premeditation and deliberation start for him? Months and years in the making."

On rebuttal, the prosecutor reiterated his theory of first degree murder after spending a majority of his time rebutting Montoya's argument. The prosecutor concluded his remarks by "asking that you hold this defendant accountable not for second degree murder, this is not a second degree murder case. This is a person who walked in there ready and got an opportunity to do what he's been brought up to do for years and to ultimately carry through with that."

V

The Verdicts And Sentences

The jury found Montoya guilty of two counts of first degree murder, one count of attempted premeditated murder,[10] and one count of assault with a firearm. It also found true a multiple-murder special circumstance. The jury further found Montoya committed the offenses for the benefit of a criminal street gang and used a firearm within the meaning of both sections 12022.53, subdivision (d) (for the murders and attempted murder) and 12022.5, subdivision (a)(1) (for the assault with a firearm). The court found Fowler-Scholz guilt of two counts of second degree murder, one count of attempted murder, one count of assault with a firearm, and one count of assault with a deadly weapon. The court then found the gun and gang allegations not true. It later found Fowler-Scholz had 12 prior strike convictions.

On each of Montoya's murder convictions, the trial court sentenced him to life without the possibility of parole plus 25 years to life pursuant to section 12022.53, subdivision (e)(1), which punished Montoya for both the gang and gun enhancements attached to those counts. The court also sentenced him to the midterm of seven years to life for the attempted murder plus 25 years to life pursuant to section 12022.53, subdivision (e)(1). As for the assault with a firearm conviction, the court sentenced Montoya to the upper term of four years plus the upper term of 10 years for the gun enhancement (§ 12022.5, subd. (a)) and five years for the gang enhancement (§ 186.22, subd. (b)(1)(B)).

On each of Fowler-Scholz's murder convictions, the court sentenced him to 45 years to life (15 years tripled pursuant to the three strikes law). It also sentenced him to 27 years to life for the attempted murder conviction (seven years tripled pursuant to the

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[10] The court denied Montoya's request to instruct the jury on voluntary manslaughter under either a heat of passion or imperfect self-defense theory.

three strikes law). It sentenced him to 25 years to life for the assault with a firearm conviction and also for the assault with a deadly weapon (beer bottle) conviction; however, it stayed the latter sentence pursuant to section 654.

Defendants appeal.

DISCUSSION

I

Sufficiency Of The Evidence

Defendants bring multiple sufficiency of the evidence claims. Montoya attacks the evidence supporting the true findings of his gang enhancements as being insufficient, along with the evidence supporting the jury's finding he committed the murders and attempted murders with premeditation and deliberation. Fowler-Scholz attacks the evidence supporting the trial judge's finding under the natural and probable consequences theory that he aided and abetted Montoya's nontarget offenses. We will address each of these contentions in turn with the following general principles of sufficient evidence review in mind.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "The standard of review is the same where the prosecution relies primarily on circumstantial evidence." (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610.) " 'An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.' " (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The

sufficiency of the evidence to support an enhancement is reviewed using the same standard applied to a conviction. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 806.)

A

The Evidence Was Insufficient To Support Montoya's Gang Enhancements

Montoya adopts the arguments he advanced in his attack on the evidence presented at the preliminary hearing when arguing sufficient evidence does not support the jury's true findings on the gang enhancements. Unlike his argument pertaining to the preliminary hearing, however, we agree that sufficient evidence was not presented establishing that the shooting was committed for the benefit of a criminal street gang.

As an initial matter, however, we reject Montoya's argument the prosecution did not meet its burden under *Prunty*. Section 186.22, subdivision (f) defines " 'criminal street gang' " as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." A " 'pattern of criminal gang activity' " is "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [certain] offenses [identified in the statute] . . . ." (*Id*., subd. (e).)

In *Prunty*, our Supreme Court "decide[d] what type of showing the prosecution must make when its theory of why a criminal street gang exists turns on the conduct of one or more gang subsets." (*People v. Prunty*, *supra*, 62 Cal.4th at p. 67.) The court held "the [Street Terrorism Enforcement and Prevention] Act requires the prosecution to introduce evidence showing an associational or organizational connection that unites members of a putative criminal street gang." (*Ibid*.) And "where the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22[, subdivision](f) turns on the existence and conduct of one or more gang subsets, then the

prosecution must show some associational or organizational connection uniting those subsets." (*Prunty*, at p. 71.)

Here, the prosecution alleged and the jury found that Montoya acted for the benefit of, at the direction of, or in association with the Norteño criminal street gang. The prosecution proved the Norteño gang was a criminal street gang within the meaning of the statute by relying on three predicate offenses committed by Varrio Diamond Sacra gang members. Thus pursuant to *Prunty*, the prosecutor was also required to prove a connection between the Varrio Diamond gang and the Norteño umbrella gang. (*People v. Prunty*, *supra*, 62 Cal.4th at pp. 67, 71.)

"That connection may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization. [¶] Whatever theory the prosecution chooses to demonstrate that a relationship exists, the evidence must show that it is the same 'group' that meets the definition of section 186.22[, subdivision](f) -- i.e., that the group committed the predicate offenses and engaged in criminal primary activities -- and that the defendant sought to benefit under section 186.22[, subdivision](b). But it is not enough . . . that the group simply shares a common name, common identifying symbols, and a common enemy. Nor is it permissible for the prosecution to introduce evidence of different subsets' conduct to satisfy the primary activities and predicate offense requirements without demonstrating that those subsets are somehow connected to each other or another larger group." (*People v. Prunty*, *supra*, 62 Cal.4th at pp. 71-72, fns. omitted.)

Detective Sample testified to the common colors, symbols, and rivals the Varrio Diamond and the Norteños share. In addition to these similarities, Detective Sample

testified about the connection between the larger Norteño group and its subsets, which affiliate through neighborhoods, families, and the prison system. Detective Sample provided an example of a Varrio Diamond gang member associating with the larger Norteño gang structure. While in jail awaiting his murder trial, Gaspar was caught communicating with other incarcerated Norteño gang members about the identities of reliable Norteño gang members incarcerated with them. Gaspar's name appeared on a communication containing the names of reliable Norteño gang members. This evidence showed the Varrio Diamond is part of the same loosely hierarchical organization as the Norteños. Upon going to jail, Gaspar did not exclusively associate with the Varrio Diamond subset but instead associated and identified with the larger Norteño network. Accordingly, the prosecution met its burden under *Prunty* to show the Varrio Diamond Sacra subset was the same Norteño group the prosecution alleged defendants benefited with their conduct. (*People v. Prunty*, *supra*, 62 Cal.4th at pp. 71-72.)

Where the prosecution did not meet its burden is when attempting to show Montoya acted for the benefit of, at the direction of, or in association with the Norteño criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. Notably, the "enhancement set forth in section 186.22[, subdivision](b)(1) does not . . . depend on membership in a gang at all. Rather, it applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*Albillar*, *supra*, 51 Cal.4th at pp. 67-68.) To prove the crime was "gang related," the prosecution need only prove one of three alternatives: the crime was committed "(1) for the benefit of, (2) at the direction of, or (3) in association with a gang." (*People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198, italics omitted.)

The prosecution's theory was that defendants were both gang members, but of different gangs. Fowler-Scholz was a member of the Varrio Diamond Norteño subset in Sacramento and Montoya was a member of the 27th Avenue Norteño subset from the Murder Dubs territory in East Oakland. Montoya moved to Sacramento at some point in

2012 and continued his gang activity by associating with Fowler-Scholz and the Varrio Diamond Norteños. Thus, when he committed the shooting at the sports bar on New Year's Eve with Fowler-Scholz, he did so for the benefit of the Norteño gang and more specifically the Varrio Diamond Norteños. Based on this theory, the prosecutor argued to the jury it could convict Montoya of the gang enhancements by finding he benefited the Norteños or that he committed the crimes in association with Norteño gang members. Culpability under the gang statute, however, does not flow from this theory and the evidence admitted to support it.

Starting with whether the shooting was committed for the benefit of a criminal street gang, the evidence was insufficient to support a finding under this theory. "A gang expert's testimony alone is insufficient to find an offense gang related. [Citation.] '[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.' " (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657; accord, *Albillar*, *supra*, 51 Cal.4th at p. 63.)

Detective Sample testified the shooting benefited the Norteño criminal street gang by enhancing its reputation for viciousness and spreading fear to its rivals and the community. Further, the shooting was committed in response to a perceived act of disrespect, which demands "harsh violence" as a response in the gang culture. Detective Sample believed defendants linked their commission of the shooting to the Norteño gang through Fowler-Scholz's conduct of wearing a red shirt under his white sweatshirt, flashing his "SACRA" tattoo, and bragging that he and Montoya were from Sacramento and Oakland. The problem with Detective Sample's opinion is that there is no evidence the witnesses to the shooting identified anything Fowler-Scholz did or wore with Norteño gang affiliation. No one other than the gang experts testified gang members or affiliates were involved in the shooting. "Therefore, the crime could not have enhanced respect for

the gang members or intimidated others in their community, as suggested by [the prosecution's expert]." (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1363.)

Although Fowler-Scholz wore a red shirt under his white sweatshirt, no witness testified he or she saw it or identified it with defendants' gang membership. The surveillance footage did not show Fowler-Scholz utilizing his red shirt to "flash [his] power" and signify his gang affiliation as Sergeant Keely testified was common. Besides testimony establishing defendants looked different than everyone else in the sports bar because they looked "thuggish" and wore "baggy clothing," no witness testified defendants identified themselves as Norteño gang members. Fowler-Scholz's "SACRA" tattoo did not unambiguously communicate his gang membership, just like his claim to be from Sacramento and Oakland failed to communicate he was a gang member. While this conduct may serve to identify Fowler-Scholz as a Norteño gang member in his own gang territory or in neighborhoods familiar with the Varrio Diamond, like Detective Sample testified, it did not do so here. Absent evidence defendants communicated their affiliation with a gang, there can be no showing defendants benefited that gang by invoking fear in the community.

Further, no evidence established that what happened here was what Sergeant Keely testified about regarding gang members wanting people to know their affiliation and flashing their power to signify "trouble is coming." Fowler-Scholz's conduct of showing off his tattoo and telling patrons of the bar he and his group were from Sacramento and Oakland did not occur as part of the shooting. The only person outside defendants' party to see Fowler-Scholz's tattoo was Chung, who saw it 30 minutes before the shooting occurred. At the time of the shooting, neither defendant invoked the name of their gang, nor did they exhibit gang signs, flash gang colors, or show off gang tattoos. Thus, even if Fowler-Scholz's conduct of showing Chung his "SACRA" tattoo and claiming to be from Sacramento and Oakland identified him as a gang member, his conduct did not serve to identify the shooting as a gang act. (See *People v. Ochoa*, *supra*,

179 Cal.App.4th at pp. 661-663 [reversal of a gang enhancement where nothing in the manner the crime was committed established a gang connection even though the victim believed the defendant was a gang member and the expert testified defendant was a gang member].)

Also telling is that our review is necessarily limited to Fowler-Scholz's conduct because Montoya did nothing throughout the night to identify himself as a Norteño gang member or affiliate. Montoya did not wear red, show a tattoo, or even talk to anybody outside his group for a substantial amount of time. While gang members may commonly use guns as their "tool of the trade" and respond with harsh violence to perceived acts of disrespect, we fail to see how Montoya's possession of a gun or quick temper served to benefit the Varrio Diamond and the Norteños when Montoya did nothing to identify himself as affiliated with that gang or its subset. No evidence established that the violence defendants responded with was motivated by gang association. The perceived disrespect defendants responded to was not from a rival gang member or in gang territory -- it was a spilled drink by an unknown bar patron. The whole of the evidence revealed defendants did little or nothing to identify themselves with any gang, let alone the one alleged, in connection with their criminal conduct. Thus, it cannot be said that their conduct benefited the Norteño gang by enhancing its reputation for violence in the community.

Neither did Montoya commit the shooting at the direction of the Norteño criminal street gang. The evidence showed it was Amber who told Fowler-Scholz to punch Cordova, at which time he and Montoya went to Cordova and started the altercation that ended in the shooting. No evidence, other than Amber's association with Fowler-Scholz, was admitted to the jury establishing Amber was a Norteño or Varrio Diamond Sacra gang member. Further, there is no evidence that Fowler-Scholz, a Varrio Diamond gang member, directed Montoya to commit the shooting.

Finally, the evidence did not support a finding Montoya committed the shooting in association with a criminal street gang. "Committing a crime in concert with known gang members can be substantial evidence that the crime was committed in 'association' with a gang. [Citation.] A crime is committed in association with a gang if the 'defendants relied on their common gang membership and the apparatus of the gang in committing' the charged felonies. [Citation.] For example, three criminal street gang members who raped and sexually assaulted a 16-year-old girl were found to have committed the crime in association with a gang because as fellow gang members they were able to rely upon each other to help facilitate the sexual assaults, they could expect their fellow gang members not to talk to the police, and they relied upon their membership in the gang to intimidate the victim." (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1367.)

As described, the evidence established Fowler-Scholz was a member of the Varrio Diamond Sacra subset of the Norteño gang and that the Varrio Diamond are part of the same hierarchical organization as the Norteños. This same showing was not made for Montoya. Detective Sample and Sergeant Keely agreed Montoya was a member of the 27th Avenue Norteños from the Murder Dubs neighborhood in East Oakland. Detective Sample testified it was common for Norteño gang members who move to a new city to associate with Norteños in that city; however, he did not testify Montoya had become a member of the Varrio Diamond since moving to Sacramento. Indeed, aside from Montoya's living arrangement with Fowler-Scholz, no evidence showed he identified or affiliated with the Varrio Diamond Sacra subset. Because the evidence and expert testimony established Fowler-Scholz and Montoya were in different subsets of the Norteño gang, the prosecution was required to link Montoya's subset to the Norteño umbrella gang and Fowler-Scholz's subset to prove defendants were members of the same gang alleged in the information. (See *Albillar, supra*, 51 Cal.4th at pp. 61-62 [for the prosecution to meet its burden under the association prong to the gang enhancement,

it must show defendants relied on their common gang membership when committing the crime].)

Detective Sample testified that members of different Norteño subsets commonly commit crimes together. But he also testified about a predicate offense wherein a Varrio Diamond gang member attempted to kill a Norteño gang member from a different Sacramento subset. This evidence makes it abundantly clear Norteño affiliated subsets, and the Varrio Diamond Sacra subset in particular, do not consider themselves part of the same criminal street gang based on their shared affiliation with the Norteño umbrella gang. No evidence was admitted showing Montoya's specific subset was connected to the Varrio Diamond subset or the Norteño umbrella gang, beyond the use of shared colors, symbols, and rivals. Given this lack of evidence, we cannot say that Montoya and Fowler-Scholz were part of the same gang for purposes of the association prong of the gang enhancement. We also cannot say defendants' conduct went beyond working in concert and instead established they came together as gang members to commit the offenses. (See *Albillar, supra,* 51 Cal.4th at pp. 61-62.) Thus, the evidence was insufficient to prove the crimes were gang related.

Similarly, the evidence was lacking as to Montoya's specific intent. Detective Sample, Sergeant Keely, and the prosecutor spent much time telling the jury about gang culture, including the culture's proclivity for violence and guns. Their reasoning was that Montoya's use of guns and harsh violence showed his intentional participation in gang culture, establishing his specific intent to intimidate his victims for the benefit of a gang. This general testimony regarding gang culture fails to draw "any distinction between crimes in general and crimes carried out with the specific intent to promote, further, or assist gang activity." (*In re Daniel C., supra*, 195 Cal.App.4th at p. 1364.) "[S]uch general opinion testimony as to intent" serves to expand "the gang enhancement statute to cover virtually any crime committed by someone while in the company of gang affiliates, no matter how minor the crime, and no matter how tenuous its connection with gang

members or core gang activities." (*Ibid*, italics omitted.) If allowed, section 186.22, subdivision (b)(1), would be impermissibly converted into a general intent crime. (*In re Daniel C.*, at p. 1364.) Accordingly, there was insufficient evidence to sustain the jury's finding that Montoya committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang.

B

There Was Sufficient Evidence To Support The Jury's Finding Montoya Acted With Premeditation and Deliberation

Montoya contends the evidence was insufficient to prove he killed Ferrier and attempted to kill Walton with premeditation and deliberation. We disagree.

" 'A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.]' (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080 . . . .) ' "Premeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." ' " ' " (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) For purposes of determining whether there is sufficient evidence of premeditation and deliberation, we do not distinguish between attempted murder and completed first degree murder. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462-1463, fn. 8.)

In *Anderson*, our Supreme Court undertook to articulate standards for determining premeditation and deliberation based on a review of the published cases. Thus, evidence establishing premeditation and deliberation include: (1) facts about a defendant's behavior before the incident that show planning; (2) facts about any prior relationship or conduct with the victim from which the jury could infer motive; and (3) facts about the manner of the killing from which the jury could infer the defendant intended to kill the

victim according to a preconceived plan. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

Montoya argues there was no evidence of planning, motive, or a deliberative manner of killing in regard to Ferrier because the evidence showed he shot Ferrier, who he did not know, immediately after Ferrier grabbed him from behind. Montoya's argument places too much emphasis on *Anderson*. The *Anderson* standards are guides to analysis; they are not rules and they are not exclusive. "Unreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way. [Citation.] *Anderson* identifies categories of evidence relevant to premeditation and deliberation that we 'typically' find sufficient to sustain convictions for first degree murder." (*People v. Thomas* (1992) 2 Cal.4th 489, 517.) Evidence of all three *Anderson* elements is not essential to sustain a conviction. (*People v. Edwards* (1991) 54 Cal.3d 787, 813.) In fact, the method of killing by itself may support a conclusion that sufficient evidence supports a finding of premeditated murder. (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.)

There is substantial evidence supporting the jury's verdict for first degree murder of Ferrier. As to prior planning activity, Montoya was carrying a loaded gun with him at the time of the incident. (See *People v. Lee* (2011) 51 Cal.4th 620, 636 [that "defendant brought a loaded handgun with him . . . indicat[ing] he had considered the possibility of a violent encounter"]; see also *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224 [the act of carrying a loaded gun shows "prior planning activity"].) A rational trier of fact could also infer that Montoya formed a plan to commit a public shooting when he followed Fowler-Scholz to Cordova for the purpose of initiating a confrontation. It is well settled that " ' "[t]houghts may follow each other with great rapidity and cold,

calculated judgment may be arrived at quickly . . . .” ’ ” (*People v. Thomas, supra,* 2 Cal.4th at p. 518.) After Montoya joined Fowler-Scholz for the purpose of initiating an altercation, the two walked over to Cordova and Montoya watched as Fowler-Scholz confronted him. The jury could reason from this evidence that Montoya formed a plan to use the loaded gun he possessed between the time he learned a confrontation would occur and the time Fowler-Scholz initiated a confrontation by hitting Cordova with a beer bottle.

With regard to motive, the jury could reasonably infer from the evidence that Montoya recognized Ferrier as a security guard from his prior interactions with him and shot him because Ferrier attempted to stop the altercation. Montoya advances a different interpretation of the evidence, wherein he fired upon Ferrier without seeing him and only after Ferrier grabbed him from behind. Montoya’s contention, however, views the evidence in the light most favorable to him rather than in the light most favorable to the judgment. (*People v. Brady* (2010) 50 Cal.4th 547, 561.) The entire series of events was recorded on surveillance footage, which the jury viewed. The footage showed Montoya talking with Ferrier outside the sports bar, and later Ferrier attempting to break up the altercation started by Fowler-Scholz and Montoya and ending with Montoya shooting him in the head multiple times. The jury could reasonably infer Montoya’s motive when shooting Ferrier was to stop Ferrier from breaking up the fight.

Evidence of the manner of killing especially supports the jury’s determination. Montoya fired three shots into Ferrier’s temple and another into his cheek from a close range, supporting a finding that he had a preconceived plan to kill. In *Halvorsen*, the defendant shot two victims in the head or neck within a few feet. In finding sufficient evidence of premeditation and deliberation, the court characterized the manner of killing as “sufficiently ‘ “particular and exacting” ’ to permit an inference the defendant was ‘acting according to a preconceived design.’ ” (*People v. Halvorsen, supra,* 42 Cal.4th at p. 422; see also *People v. Manriquez* (2005) 37 Cal.4th 547, 577 [after verbal altercation

with victim, defendant "pulled a firearm from his waistband, cocked the weapon, and fired several shots to the victim's head, neck and chest areas -- conduct that, viewed as a whole, supported the jury's findings of premeditation and deliberation"].) The location of the gunshot wounds to Ferrier and the close proximity from which they were delivered, could lead a jury to reason "the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way." (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27, italics omitted.)

Similarly, the evidence established Montoya attempted to kill Walton with premeditation and deliberation. Like with Ferrier, the jury could reasonably find Montoya formed a plan to engage in a public shooting while walking with Fowler-Scholz to initiate an altercation with Cordova. Also like Ferrier, Montoya interacted with Walton before the shooting and knew him to be a security guard and shot him only once when Walton attempted to break up the altercation and apprehend Montoya. Montoya argues his act of shooting Walton was a response to Walton grabbing him after he shot Ferrier, Cordova, and Christina, and cannot be said to be part of some plan or attributed to some motive or deliberative manner of killing. Again, Montoya's contention views the evidence in the light most favorable to him rather than in the light most favorable to the judgment. (*People v. Brady*, *supra*, 50 Cal.4th at p. 561.) A jury could reasonably find that Montoya intended to engage in a public shooting and then premeditated and deliberately shot Walton intending to kill him to avoid apprehension. Accordingly, sufficient evidence supports the jury's premeditation and deliberation finding as it pertains to the murder of Ferrier and the attempted murder of Walton.

C

Sufficient Evidence Supports Fowler-Scholz's Guilt

On An Aider And Abettor Theory

Fowler-Scholz contends there was insufficient evidence to support his convictions for murder, attempted murder, and assault with a firearm because no evidence showed these offenses were the foreseeable product of a common plan to commit the target offense -- an assault on Cordova. We disagree.

" '[S]ection 31, which governs aider and abettor liability, provides in relevant part, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." An aider and abettor is one who acts "with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." [Citations.]' '[A] person who aids and abets the commission of a crime is a "principal" in the crime, and thus shares the guilt of the actual perpetrator.' . . .

"An aider and abettor is guilty not only of the intended, or target, crime but also of any other crime a principal in the target crime actually commits (the nontarget crime) that is a natural and probable consequence of the target crime. [Citations.] 'Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. . . .'

"A consequence that is *reasonably foreseeable* is a natural and probable consequence under this doctrine. 'A nontarget offense is a " 'natural and probable consequence' " of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability " 'is

measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' " [Citation.] Reasonable foreseeability "is a factual issue to be resolved by the [trier of fact]." ' " (*People v. Smith* (2014) 60 Cal.4th 603, 611.)

"In the context of murder, the natural and probable consequences doctrine serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing. A primary rationale for punishing such aiders and abettors -- to deter them from aiding or encouraging the commission of offenses -- is served by holding them culpable for the perpetrator's commission of the nontarget offense of second degree murder." (*People v. Chiu* (2014) 59 Cal.4th 155, 165.) "[P]unishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine." (*Id*. at p. 166.)

As an initial matter, we address Fowler-Scholz's argument the law required the prosecutor, in addition to proving the foreseeability of the nontarget offense, to prove defendants acted with a common plan to commit the target offense of assault on Cordova. This argument was rejected by our Supreme Court in *Smith*. "To establish aiding and abetting liability under the natural and probable consequence doctrine, the prosecution must prove the nontarget offense was reasonably foreseeable; it need not *additionally* prove the nontarget offense was not committed for a reason independent of the common plan to commit the target offense." (*People v. Smith*, *supra*, 60 Cal.4th at p. 614.) If the prosecutor had to also prove defendants acted pursuant to a common plan that "would mean that a nontarget offense, even if reasonably foreseeable, is not the natural and probable consequence of the target offense if the jury finds it was committed for a reason independent of the common plan to commit the target offense. . . ." (*Ibid*.) "Because the aider and abettor is furthering the commission, or at least attempted commission, of an

actual crime, it is not necessary to add a limitation on the aider and abettor's liability for crimes other principals commit beyond the requirement that they be a natural and probable, i.e., reasonably foreseeable, consequence of the crime aided and abetted." (*Id.* at pp. 616-617.)

"To be sure, whether an unintended crime was the independent product of the perpetrator's mind outside of, or foreign to, the common design may, if shown by the evidence, become *relevant* to the question whether that crime was a natural and probable consequence of the target crime. In a given case, a criminal defendant may argue to the jury that the nontarget crime was the perpetrator's independent idea unrelated to the common plan, and thus was *not* reasonably foreseeable and *not* a natural and probable consequence of the target crime. But that would be a factual issue for the jury to resolve [citation], not a separate legal requirement." (*People v. Smith, supra*, 60 Cal.4th at p. 617.)

Regardless, there was evidence of a common plan to assault Cordova. After Amber told Fowler-Scholz that Cordova spilled his drink on her, Fowler-Scholz asked her whether she wanted him to punch Cordova. After Amber said yes, Fowler-Scholz, Montoya, and Amber walked over to where Cordova was standing. After a verbal altercation that also included Montoya, Fowler-Scholz hit Cordova with a beer bottle. A fact finder could reason from this evidence that defendants, having been told to assault Cordova, formed a common plan to assault him that they carried out together by walking to Cordova and initiating a verbal and physical altercation.

The record as a whole also provides sufficient evidence from which a reasonable trier of fact could have found the nontarget offenses of murder, attempted murder, and assault with a firearm were natural consequences of the planned assault on Cordova. Although the court found the shooting was not a gang shooting within the meaning of the gang statute, ample evidence showed both Fowler-Scholz and Montoya were extensively involved in Norteño gangs. The gang experts testified about the importance of guns

within the gang culture and that it is extremely common for gang members to either be armed or be in a group where at least one person is armed. Guns are treated as property of the gang, and not a single member, and guns are often shared among multiple people. The person who usually is tasked with carrying a weapon for a group of gang members is the person with the lowest risk of being found with a gun, or the person with the lowest risk of criminal liability in the event he or she is caught with a gun. Further, acts of violence are particularly common from gang members if that gang member believes he has been disrespected. The evidence also showed defendants lived together for months before the shooting and had a relationship that went beyond being roommates and included social interactions. A gun holster was also found in the house defendants shared, although no guns or ammunition were recovered.

From this evidence, the trier of fact could reason that Fowler-Scholz, having lived and associated with Montoya for an extended amount of time, knew Montoya identified with and subscribed to gang values. Montoya had a gang-related tattoos and possessed gang clothing, things Fowler-Scholz would have come in contact with while living with Montoya. Given Fowler-Scholz's extensive history with gangs, it can be inferred he also knew what those gang values were, even if he did not personally subscribe to them. The fact finder could reasonably infer from this evidence that Fowler-Scholz knew Montoya would act in a "harsh[ly] violent" way when presented with a perceived act of disrespect. As Detective Sample testified, "[i]t's sort of a one-up kind of situation. If you call me a name, I'm gonna pull out a weapon and use my weapon to show you . . . that you will respect me." This is exactly what Fowler-Scholz did when responding to an act of disrespect by hitting Cordova on the head with a beer bottle and what Montoya did when escalating the assault to a public shooting.

The trier of fact could also reasonably infer Fowler-Scholz knew Montoya was armed when the men confronted Cordova and Fowler-Scholz initiated the assault. A gun holster was found in defendants' home, suggesting a gun was at some point also in the

home. Detective Sample and Sergeant Keely testified it was common for gang members to share ownership of a gun and for only one person to be armed when out in public with a group of gang members. Indeed, Fowler-Scholz had been documented in the past sharing guns with fellow Norteño gang members while on social outings. Given the indicia of gun ownership and Detective Sample's testimony, it is reasonable to infer that the gun Montoya possessed was the gun he and Fowler-Scholz shared. Further, because Montoya had a minor criminal history when compared to Fowler-Scholz, it was likely the two decided Montoya would carry the gun on the night of the shooting to avoid detection as Detective Sample testified was common among Norteño gang members.

Fowler-Scholz argues these inferences are not reasonable because the shooting was not a gang-related shooting. Like the trial court, we agree that the shooting was not strictly gang related. But just because this shooting was not gang related within the meaning of the gang statute, does not mean the gang evidence was irrelevant and cannot be used to inform the trier of fact about what is reasonably foreseeable under the circumstances of Fowler-Scholz's case. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 ["Evidence of the defendant's gang affiliation -- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime"].) Because the evidence established Fowler-Scholz likely knew Montoya was armed and would respond to an act of disrespect with harsh violence, sufficient evidence proved the murders, attempted murder, and assault with a deadly weapon were natural and probable consequences of Fowler-Scholz's assault on Cordova.

II

The Court Did Not Err By Admitting Two Of Fowler-Scholz's Prior Acts; Admission Of The Third Was Harmless

Fowler-Scholz contends the trial court erred by admitting his "dissimilar and prejudicial" prior acts of gun possession for the purpose of showing he could reasonably foresee the natural and probable consequence of his assault on Cordova was Montoya's public shooting. Montoya joins Fowler-Scholz's argument to the extent the prior acts evidence admitted to his jury prejudiced him and also argues the court erred by allowing his jury to hear a substantial amount of gang affiliation evidence related to Fowler-Scholz. We agree with Fowler-Scholz that one of the prior acts should not have been admitted into evidence; however, we conclude its admission was harmless. We further reject Montoya's claim evidence related to Fowler-Scholz's gang affiliation was unduly prejudicial to him.

Evidence Code section 1101, subdivision (a), prohibits the admission of evidence of uncharged offenses to prove propensity or disposition to commit the charged crime. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; *People v. Hendrix* (2013) 214 Cal.App.4th 216, 238.) However, subdivision (b) of that section provides that such evidence is admissible "when relevant for a noncharacter purpose -- that is, when it is relevant to prove some fact other than the defendant's criminal disposition, such as 'motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake [of fact] or accident.' " (*Hendrix*, at p. 238.)

Here, the court admitted three prior acts involving Fowler-Scholz's possession or shared possession of a gun: 1) Viduya took responsibility for possessing a gun police officers found under a car's passenger seat Fowler-Scholz had recently occupied; 2) Amber told her aunt she had Fowler-Scholz's gun; and 3) Madrigal took responsibility for a robbery and shooting Fowler-Scholz committed. It admitted these acts to prove Fowler-Scholz's state of mind, knowledge, and intent.

The connection of the evidence of prior crimes with the crime charged must be clearly perceived, and it has sufficient probative value only when it tends " ' "logically, naturally, and by reasonable inference, to establish any fact material for the [P]eople, or to overcome any material matter sought to be proved by the defense." ' " (*People v. Haston* (1968) 69 Cal.2d 233, 247.) " ' "When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant." ' " (*People v. Thompson* (2016) 1 Cal.5th 1043, 1114.)

" 'Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it." ' " (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 754.) " 'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act . . . ." [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.' " ' " (*People v. Harris* (2013) 57 Cal.4th 804, 841.)

"Whether similarity is required to prove knowledge and the degree of similarity required depends on the specific knowledge at issue and whether the prior experience tends to prove the knowledge defendant is said to have had in mind at the time of the crime." (*People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 241.)

The court may nonetheless exclude such evidence under Evidence Code section 352 "if its probative value is substantially outweighed by the probability that its

admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (See *People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

"We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352." (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) The trial court's decision "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10.)

To prove Fowler-Scholz was guilty of the nontarget offenses of murder, attempted murder, and assault with a firearm, the prosecution was required to prove Fowler-Scholz could reasonably foresee Montoya's commission of those offenses as a consequence of his (Fowler-Scholz) assault on Cordova. Showing Fowler-Scholz knew or should have reasonably known Montoya was armed would be highly material to the foreseeability question of the natural and probable consequences doctrine. The gang experts testified guns were commonly shared among multiple gang members and passed around as property of the gang instead of belonging to a single member. They also testified it was common for one gang member to hold a weapon for a group of gang members when the group was in public. The person who held the gun was usually the person with the least risk of detection or the person who would get in the least amount of trouble. This meant women or young persons were usually delegated as the person to be armed in public.

As it pertains to the prior acts involving Viduya and Madrigal, both involved Fowler-Scholz on a social outing with a group, comprised of at least one other gang affiliate, in which one gun was shared among the group and the person with the lowest risk of detection or punishment possessed or claimed possession of the gun. These circumstances provided an example of what the experts testified about and mirrored the conduct in this case. In the act involving Viduya, an admitted Norteño gang member,

she, Fowler-Scholz, and two others were driving in Sacramento after a night of going to bars and drinking. One gun was present and, once seized by police officers following a traffic stop, Viduya claimed ownership of the gun. Similarly, in the act involving Madrigal, a Norteño affiliate at the time, he, Fowler-Scholz, Amber, and Fowler-Scholz's brother, were on their way to a rave. One gun was present among the group and, after the group committed a robbery, Fowler-Scholz used it to shoot at his victim. Once the group was caught, however, it was Madrigal, the person without a criminal history, to claim possession of the gun.

Like these two prior acts, on the night of the shooting, Fowler-Scholz was at a social outing with a Norteño affiliate. Also like the two prior acts, a single gun was present. Like in the act involving Madrigal, defendants detoured from an otherwise social occasion to commit an act of violence involving the single gun possessed by the group. Although it appears Fowler-Scholz possessed the weapons during the prior acts, when the threat of police detection was present, it was the person with the least criminal exposure to take responsibility for the weapon. That is also what happened here. Montoya and Fowler-Scholz spent a significant amount of time in a public bar before the shooting, with police and security presence high because of the New Year's Eve holiday. The person least likely to be detected with a weapon was Montoya who was younger than Fowler-Scholz and had a less extensive criminal record.

The fact that Montoya was not involved in these prior acts is of little consequence. The fact to be proven as presented by the expert testimony was that Norteño gang members commonly share possession of a gun while in public and the person least likely to be discovered with or punished for it is the person responsible for possessing the weapon. The prosecution offered evidence to establish that Montoya was a Norteño affiliate and evidence Fowler-Scholz knew of Montoya's status. The standard for admission of the evidence is not that it proves the foreseeability of Montoya's behavior, but rather that it tends to prove Fowler-Scholz knew Montoya was armed. (See *People v.*

Haston, *supra*, 69 Cal.2d at p. 247 [the evidence must tend to establish a material fact].) In the past, Fowler-Scholz has shared a single weapon with Norteño affiliates and members while at social outings -- circumstances similar to the current offense. Given this evidence, we conclude the prior acts involving Viduya and Madrigal were sufficiently similar to support the inference that Fowler-Scholz " ' " 'probably harbor[ed] the same [knowledge] in each instance.' " ' " (*People v. Harris*, *supra*, 57 Cal.4th at p. 841.)[11]

Neither were these acts made inadmissible by Evidence Code section 352. This section is intended to prevent undue prejudice -- that is, "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues" (*People v. Morton* (2008) 159 Cal.App.4th 239, 249), not the prejudice that naturally flows from relevant, highly probative evidence. (*People v. Salcido* (2008) 44 Cal.4th 93, 148). Citing *People v. Albarran* (2007) 149 Cal.App.4th at page 227, Fowler-Scholz argues the shooting was not gang related and thus the prior acts provided limited probative value, which was severely outweighed by its prejudicial effect and does not support an inference of foreseeability.

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11 Fowler-Scholz spends much time arguing the prior acts and the current offenses are not gang related and thus serve no probative value as far as the prosecutor's argument the shooting was reasonably foreseeable because Norteños carry guns and engage in violence. Fowler-Scholz defines our inquiry too broadly. While the prosecutor relied on *Godinez*, a case involving a gang assault resulting in a murder, for admission of Fowler-Scholz's prior acts, Fowler-Scholz's prior acts were probative to the much narrower question of whether Fowler-Scholz knew Montoya was armed. Thus, *Godinez* is not relevant to our inquiry. The evidence showed Fowler-Scholz had previously and knowingly shared guns with Norteño affiliates while in social settings. Whether those social settings were gang related is relevant to the foreseeability analysis insofar as the prior act is similar to the current offenses. Here, because none of the prior or current offenses appears to involve the use of gang signs, colors, or symbols, the acts appear even more similar to one another than Fowler-Scholz would have us believe.

Fowler-Scholz's reliance on *Albarran* is misplaced. In *Albarran*, a gang expert testified about the defendant's membership in a criminal street gang and presented a panoply of other crimes its members had committed, including making threats to kill police officers and connections with the Mexican Mafia. The court determined the gang evidence was insufficient to prove the crime was committed to benefit a criminal street gang as no one announced affiliation with the gang at the time of the crime and no one later took credit for it or bragged about it. (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 227.) Nevertheless, the trial court found the gang evidence relevant to prove motive and intent of the underlying crime. The appellate court disagreed. It found the gang testimony regarding other gang members' crimes and threats to police was completely irrelevant to show motive or intent and had no bearing on the underlying charges. (*Id*. at p. 229.)

Here, there were permissible inferences the jury could draw from the evidence of Fowler-Scholz's prior acts involving Viduya and Madrigal. As discussed above, the prior acts evidence was relevant to demonstrate knowledge and intent. The gang expert testimony explained Norteño gang members often go out in public together with a shared gun possessed by the person least likely to be caught or suffer harsh criminal sentences. Fowler-Scholz's prior acts involving Viduya and Madrigal are examples of that. Thus, unlike in *Albarran*, the gang evidence here was relevant to Fowler-Scholz's knowledge that Montoya was armed, and thus the ultimate foreseeability of his conduct.

We, however, are not so convinced about the prior act involving Amber. That act did not involve Fowler-Scholz during a social occasion or even a group of gang members sharing ownership of a gun while together in public. The prior act as revealed in Amber's text messages to her aunt showed that Amber had possession of Fowler-Scholz's gun. The text messages did not reveal why or even if Fowler-Scholz knew Amber had possession of his gun. The text messages prove only that Fowler-Scholz may have owned a gun. Absent proof that the gun Amber texted about was the gun used in

the shooting, there is little, if any, probative value to this prior act. (See *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1393 [Evidence a defendant possessed a weapon not used in the commission of a charged offense is generally inadmissible when its only relevance is to show the defendant is a person who surrounds himself with weapons].) Even more suspect is the admission of Amber's aunt's text message describing Fowler-Scholz as scary. This comment was not relevant or necessary to the admission of the prior act evidence and could have easily been redacted. The admission of this prior act was unduly prejudicial when weighed against its probative value. (See Evid. Code, § 352.)

A claim that evidence pursuant to Evidence Code section 1101, subdivision (b), was erroneously admitted is reviewed under the test of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Malone* (1988) 47 Cal.3d 1, 22.) Under *Watson*, an error is reversible if there is a reasonable probability that the outcome of the trial would have been more favorable to the defendant in the absence of the error. (*Watson*, at p. 836.) A reasonable probability in this context means merely a reasonable chance, more than an abstract possibility. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.) A judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate both error and prejudice. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549; *People v. Coley* (1997) 52 Cal.App.4th 964, 972.)

Fowler-Scholz cannot demonstrate he was harmed by the admission of the prior act involving Amber. The court found the gang allegations not true, showing it was not blinded by the prosecutor's argument and the experts' testimony that guns and gangs are inextricably linked. For the court, Fowler-Scholz's possession and ownership of guns was not in and of itself a sign the crimes were gang related. The record reveals the trial court's ability to fairly weigh the evidence regarding Fowler-Scholz's gang allegations and we are assured it likewise weighed the evidence when determining Fowler-Scholz's

guilt of the substantive offenses. There is no indication the court found Fowler-Scholz guilty based on Amber's assertion he owned a gun and she possessed it.

Montoya, who joined in Fowler-Scholz's claim, argues the error of admitting the prior acts prejudiced him, as did the substantial gang affiliation evidence regarding Fowler-Scholz. The problem with Montoya's argument as far as the prior act involving Viduya and evidence regarding Fowler-Scholz's gang affiliation is that this evidence was cross-admissible against him. The prosecutor used the gun possession incident involving Viduya as a predicate offense to prove the Norteño gang was a criminal street gang within the meaning of the statute. Further, Fowler-Scholz's gang affiliation was relevant to the gang allegation and the prosecutor's theory that Fowler-Scholz was the older and more experienced gang member, while Montoya was younger and looking for a gang to join upon moving to Sacramento.

Neither did Fowler-Scholz's prior act involving Amber harm Montoya.[12] The act related only to Fowler-Scholz's possession of guns and, while testimony related to it contained unnecessary character assessments, it was brief and limited to Fowler-Scholz. Additionally, evidence established that Fowler-Scholz owned guns and had used them in crimes. Evidence of one more instance, especially when Fowler-Scholz was not in possession of the gun or using it in a violent way, was not likely to elicit an emotional response from the jury so that it would find Montoya guilty by association. Accordingly, Montoya was not harmed by the admission of Fowler-Scholz's prior act involving Amber.

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12 The prior act involving Madrigal was not admitted into evidence in front of Montoya's jury.

III

The Trial Court Was Not Required To Instruct On Voluntary Manslaughter

Montoya contends his convictions for murder and attempted murder must be reversed because the trial court erred by refusing to instruct the jury on voluntary manslaughter based on heat of passion, imperfect self-defense, and imperfect defense of others. Montoya argues that when focusing on his subjective state of mind, the evidence showed he believed in the need to defend himself and Fowler-Scholz from Cordova, Ferrier, and Walton, or that he acted rashly and without deliberation. We disagree.

A trial court's duty to instruct on general principles of law extends to lesser included offenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) The court has a sua sponte duty to instruct on a lesser included offense "if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118.) We independently review Montoya's claims of instructional error. (*People v. Ghebretensae*, *supra*, 222 Cal.App.4th at pp. 153-154.)

Heat of passion voluntary manslaughter is a lesser included offense of murder. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 153-154; *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1446.) So too is imperfect self-defense and imperfect defense of others. (*People v. Birks*, *supra*, 19 Cal.4th at p. 118.) The heat of passion theory has two components: (1) the accused's heat of passion must be due to sufficient provocation by the victim (or reasonably believed by the defendant to have been engaged in by the victim), such that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection; and (2) the accused must have killed while under the actual influence of a strong passion induced by such provocation. (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.) A person has engaged in "imperfect" self-defense or defense of others if he kills someone with an actual but unreasonable belief that he or someone else is in imminent danger of great bodily injury or death. (*People v. Simon* (2016) 1 Cal.5th 98, 132.)

Montoya fails to establish instructional error under any theory because no evidence indicated that anyone other than defendants were the aggressors leading up to the shooting. Montoya's entire argument is premised upon the assumption that "Fowler-Scholz and Montoya went to speak to [Cordova] after [he] spilled a drink on Amber." Defendants, however, did not approach Cordova to speak with him, but to beat him up as requested by Amber. Indeed, nobody testified, and the surveillance footage did not show, defendants innocently walked over to Cordova for a conversation. Instead, the record shows Amber telling Fowler-Scholz to beat up Cordova before he and Montoya confronted him about disrespecting her. Fowler-Scholz told Cordova to step outside, indicating he wanted to fight Cordova, before throwing a beer bottle at his head and bear-hugging him to the ground. Ferrier touched Montoya only to break up the fight and was immediately shot -- Ferrier was not showing any provocation or threatening bodily harm. The same is true for Walton, who touched Montoya when seeing him standing near bodies. His conduct was not aggressive or provoking until after Montoya had shot him twice in the abdomen. Accordingly, there is no evidence indicating Montoya perceived his victims posed a risk of imminent peril or engaged in sufficient provocation that would cause an ordinary person to act rashly. The court did not err.

IV

Montoya's Counsel Was Not Ineffective

Montoya contends his counsel was ineffective for failing to object to multiple instances of misconduct during the prosecutor's opening, closing, and rebuttal arguments. Specifically, Montoya points to his counsel's failure to object to the prosecutor's repeated statements urging the jury to find him guilty by using "the gang evidence as propensity evidence, evidence of premeditation, and evidence of intent to kill." The People counter that the prosecutor's argument was a proper comment on Montoya's intent and thus his counsel cannot be faulted for failing to bring a meritless objection. While portions of the prosecutor's argument regarding Montoya's gang affiliation and intent was improper, we

need not address counsel's perceived deficiencies because we conclude Montoya was not harmed by his counsel's failure to object to the prosecutor's argument.

"To show ineffective assistance of counsel, defendant has the burden of proving that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." (*People v. Kelly* (1992) 1 Cal.4th 495, 519-520.) "[W]hen considering a claim of ineffective assistance of counsel, 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' " (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

Gang evidence is relevant to prove intent and motive. (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1049.) The People argue that is exactly what the prosecutor did here and his statements were not improper comments on the evidence. To be sure, the prosecutor relied on the experts' testimony regarding gang culture to argue Montoya held the required premeditation and deliberation required of first degree murder. For example, in his rebuttal argument the prosecutor pointed to the experts' testimony that perceived disrespect is often met with harsh acts of violence in gang culture. There was evidence Montoya engaged in that gang-like thought process the night of the shooting because he responded to a perceived act of disrespect with harsh violence. While viewing the surveillance video, the prosecutor went through a step-by-step analysis of Montoya's conduct and argued for premeditation and deliberation based on the conduct alone without reference to his gang affiliation.

But while the prosecutor's statements regarding gang culture did include argument about Montoya's intent, the prosecutor's statements covered so much more. During his opening statement, the prosecutor set up the trial to answer the question of why the

shooting happened. He promised that the jury would see it happened because of who Montoya was and the "twisted" mind-set of the Norteño gang he affiliated with. According to the prosecutor during closing argument, the gang evidence did not solely prove intent, but also provided the reason for why Montoya walked into the bar the way he did, why the group was so boisterous, why they danced the way they did, why they gave high-fives to the bar's patrons, and why they had so much confidence. Every one of Montoya's acts was a result of his gang membership and affiliation. After setting up this backdrop of Montoya's conduct the night of the shooting, the prosecutor related his statue analogy and entered into an analysis of the surveillance footage, thereby encouraging the jury to take Montoya's character and propensity to act as a gang member into account when viewing the footage.

The prosecutor ended this analysis arguing Montoya walked into the bar knowing what he was going to do because he adopted the lifestyle of the Norteño gang, which was murder and guns. In fact, Montoya premeditated and deliberated for months and years before the shooting. His premeditation and deliberation can be traced back to 2006 when he was first documented participating in Norteño culture -- six years before walking into the sports bar and seeing Cordova and Ferrier for the first time. While the prosecutor argued the facts of the shooting showed Montoya acted with premeditation and deliberation, the whole of his argument was that the facts did not matter. The prosecutor's argument taken to its logical conclusion would have any murder committed by Montoya be the result of premeditation and deliberation due to his gang involvement no matter the facts or circumstances of the particular case. That argument is one of propensity and not a proper argument to make to the jury. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [although relevant to prove motive or identity, there is always a risk the jury will use gang evidence to improperly infer the defendant has a criminal disposition and is therefore guilty].)

Regardless, Montoya cannot show a different outcome would have resulted had his counsel objected to the prosecutor's argument. The jury was instructed with CALCRIM No. 1403 as follow: "You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes and enhancements charged. [¶] OR [¶] The defendant had a motive or mental state to commit the crimes charged. [¶] . . . [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." It was also instructed that if argument of counsel conflicted with the law as related by the instructions, then it must follow the instructions and not counsel's argument. We presume the jury understood and followed these instructions. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1326.)

Moreover, the entire course of Montoya's conduct was captured on surveillance video. The jury was able to see Montoya throughout the night and judge his guilt through his own acts and not merely through testimony of those who saw the shooting. The jury was able to assess the start of the confrontation when Fowler-Scholz and Montoya walked up to Cordova and the events leading up to the brawl that elicited a response from Ferrier. To this end, the video showed defendants approach Cordova with the intent to initiate an altercation because Cordova spilled a drink on Amber. The video further showed defendants' disproportional response to the spilled drink when Fowler-Scholz, after verbally assaulting Cordova, hit him over the head with a beer bottle and Montoya pulled a gun out of his waistband. Conduct the gang experts testified was common of gang members when confronted with perceived acts of disrespect.

Through the surveillance video, the jury also saw the circumstances of the shooting itself. As described, Montoya shot Ferrier multiple times in the head and Cordova multiple times in the torso, both at close range. He shot Ferrier as Ferrier was attempting to break up the fight defendants started, seeming to try to stop Ferrier from

ending the confrontation or apprehending Fowler-Scholz. He further shot Walton when Walton attempted to apprehend him after he shot Ferrier and Cordova and the bar had emptied of patrons. A clear motive is discernable from the surveillance video for each of Montoya's victims he shot with premeditation and deliberation -- he shot Cordova as the victim of his assault and because he disrespected Amber; he shot Ferrier so Ferrier would not break up the fight, and he shot Walton to avoid capture. The fact that the jury was able to view the events as they unfolded and assess Montoya's conduct for itself dispelled much of the prejudice resulting from the prosecutor's statements. The jury instructions served to dispel any remaining prejudice and make us confident the outcome of the murder and attempted murder convictions would not have been different had Montoya's counsel objected to the prosecutor's statements. Accordingly, Montoya's counsel was not ineffective.

V

There Was No Cumulative Error

Montoya seeks reversal based on cumulative error. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) Here, we concluded there was one evidentiary error, but the error was harmless. Accordingly, there was no cumulative error.

VI

Montoya's Case Must Be Remanded For The Court To Decide Whether To Strike Montoya's Gun Enhancements

Montoya argues his case must be remanded so the trial court may exercise its discretion to decide whether to strike his gun enhancements. The People agree that recent amendments to sections 12022.5 and 12022.53 retroactively apply to Montoya but argue remand would be useless because it is clear from the court's statements at sentencing that Montoya would not receive a reduced sentence.

We agree with the parties that the amendments to sections 12022.5 and 12022.53 apply to Montoya. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) We need not determine what the court would have done had it known of its discretion, as we have stricken Montoya's gang enhancements entitling him to resentencing. Under sections 12022.5, subdivision (c) and 12022.53, subdivision (h), a court may exercise its newly granted discretion upon "resentencing that may occur pursuant to any other law." When the court originally sentenced Montoya, it imposed the gang and gun enhancements for the murders and attempted murder together pursuant to section 12022.53, subdivision (h). He received 25 years to life for each of these enhancements. Now that the gang enhancements have been stricken, Montoya must be sentenced pursuant to section 12022.53, subdivision (d), which also provides for 25 years to life but does not also punish for the gang enhancement. Given that the penalty is the same but a key finding (gang benefit) need not be shown, it is not at all clear what the trial court would do in this instance and whether it would find that using a gun deserves as much punishment as using a gun for the benefit of a criminal street gang. For this reason, Montoya's case must be remanded for the court to exercise its discretion whether to strike the gun enhancements.

VII

Fowler-Scholz's Abstract Of Judgment Should Be Corrected

Fowler-Scholz contends, and the People concede, his abstract of judgment must be corrected to properly reflect the imposed sentence of 25 years to life for the assault with a deadly weapon conviction. We agree. We have " 'the inherent power to correct clerical errors in [the] record so as to make these records reflect the true facts.' " (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) "Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts." (*Ibid.*) Here, the trial court orally imposed 25 years to

life on the assault with a deadly weapon conviction; however, the abstract of judgment reflects a sentence of 45 years to life. The trial court is ordered to correct the abstract to accurately reflect Fowler-Scholz's imposed sentence.

VIII

Defendants' Cases Should Be Remanded In Light Of Dueñas

In supplemental briefing, Montoya, joined by Fowler-Scholz, requests we strike the court facilities fee (Gov. Code, § 70370), the court operations fee (§ 1465.8), and the booking fee (Gov. Code, § 29550.2) because the record does not establish their ability to pay these fees. They further ask that we stay execution of the general restitution fine imposed under section 1202.4 until the prosecution demonstrates their present ability to pay the fine. The People counter that defendants have forfeited this contention for failing to object at the trial court and that their claim otherwise fails because the record does not show their inability to pay. We agree with the People that defendants have forfeited the challenge to the general restitution fine and the booking fee but disagree as to the court facilities fee and the court operations fee. We further conclude defendants' cases should be remanded for them to present evidence regarding their inability to pay these fees.

Our Supreme Court has stated that a defendant is required to object to challenge the court's failure to consider his or her inability to pay when imposing the general restitution fine pursuant to section 1202.4 and the booking fee. (*People v. McCullough*, *supra*, 56 Cal.4th at pp. 596-597; *People v. Nelson*, *supra*, 51 Cal.4th at p. 227.) Given this clear authority, we must find that defendants have forfeited their challenge to the imposition of this fine and fee. Before *Dueñas*, however, it was clear an objection to the court facilities and court operations fees would not have been entertained. Indeed, the statutory provisions regarding these fines mandated their imposition, regardless of a defendant's ability to pay. (Gov. Code, § 70373; § 1465.8.) While our Supreme Court has stated that an objection is necessary to challenge fees imposed at sentencing, this was in the context of a defendant's ability to pay or regarding fees not mandated by statute,

and not in the context of a fee mandated by statute, where the ability to pay was not a factor concerning its imposition. (*People v. Trujillo* (2015) 60 Cal.4th 850, 853-856; *People v. Aguilar* (2015) 60 Cal.4th 862, 864-865.) Given the mandatory language in the fee statutes defendants now challenge and the lack of authority pertaining to whether mandatory fees can be stricken on ability to pay grounds, we conclude any objection to the imposition of the court facilities fee and the court operations fee would have been overruled out of hand. Thus, defendants have not forfeited their challenge to the court facilities and court operations fees by failing to object.[13]

The People contend that even if not forfeited, defendant's challenge to the imposition of these fees is meritless because the record does not demonstrate their inability to pay. Defendants, on the other hand, contend the fees must be stricken because the record does not demonstrate their ability to pay. We do not agree with either party. The record in this case is silent as to whether defendants could pay the imposed fees. There is limited information in defendants' probation reports regarding their ability to pay and the court made no statements at sentencing indicating it considered this factor when imposing the maximum general restitution fine or any of the other fees imposed. Although that consideration is a factor outlined in section 1202.4 when imposing above the minimum fine for general restitution, given the court's and probation reports' silence on this factor, we are not confident the trial court took defendants' ability to pay into account when imposing the general restitution fine. As a result, we decline to impute the implied finding that defendants had the ability to pay the restitution fine to defendants'

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[13] This same reasoning is not applicable to defendants' challenge to the general restitution fine. Although that fine is mandatory, the trial court did not impose the minimum amount proscribed by statute ($300), and instead imposed the maximum amount ($10,000). (§ 1202.4, subd. (b)(1).) This is not a case where the trial court felt it had to impose a general restitution fine regardless of defendants' ability to pay, indicating an objection on that ground would have been entertained by the court.

ability to pay the court facilities and court operations fees. Because the court made no finding regarding defendants' ability to pay and the record is silent in this regard, we conclude it appropriate to remand defendants' cases to the trial court for it to make this determination once defendants have presented evidence regarding their inability to pay and the prosecution has had an opportunity to respond.

DISPOSITION

The true findings on Montoya's gang enhancements are stricken. His case is remanded to the trial court so the court may exercise its discretion under sections 12022.5, subdivision (c) and 12022.53, subdivision (h) and for Montoya to demonstrate his inability to pay the court facilities fee (Gov. Code, § 70370) and court operations fee (§ 1465.8). The judgment is otherwise affirmed.

Fowler-Scholz's case is remanded so that he may demonstrate his inability to pay the court facilities fee (Gov. Code, § 70370) and the court operations fee (§ 1465.8). The judgment is otherwise affirmed. The trial court is directed to correct the abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Hull, J.